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Thesis for the Degree of P.D.

SERVITUDES IN THE LAW OF SCOTLAND - principles
sources and influences which have affected the
law.



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(1)

In our legal system there are few subjects of greater interest than that branch of the law which relates to servitudes. Intimately connected with the Roman principles yet containing many indigenous features derived both from the nature of our country and the history of our law, servitudes in Scotland present a comprehensive and engrossing field of study.

It is remarkable that the subject is one which has been largely neglected in Scotland. The corpus juris civilis concedes the eighth book entirely to servitudes: France has the Traité des Servitudes of Pardessus: in England there are the excellent treatises of both Gale and Goddard: but in Scotland, apart from chapters in the works of the institutional writers, we have no authority in this branch of the law.

In the following pages there are numerous references
(1)
to the law of France. Apart from the interest of comparative study, the outstanding position which France has occupied in the preservation and revival of the Civil Law through the construction /

(1) The writer is indebted to Professor Paul Collinet and M. Nicolau of the Faculty of Law of the University of Paris for guiding him in his study of the French law of Servitudes.

construction of the Code Napoléon warrants such references. But the practice in France has another claim on our consideration, for many signs of French influence can be found in our legal system, and was it not on the model of the Parlement of Paris that the Court of Session was founded? Recent investigations further suggest that the reception of Roman Law in Scotland was by way of France, and so we ^{may} owe more to the old political alliance than has hitherto been realised.

The law of England also provides an interesting contrast with Scots Law in the subject of this study. In that country such rights as we class under servitudes fall into two distinct branches of easements and profits à prendre. The division is a simple one though its effect is considerable, but it is one which has never been applied in Scotland. An easement comprises all the servitude rights which give the dominant owner some benefit over the servient land without the right of taking any tangible profit from it. Thus rights of way, of light, and all the urban servitudes are included in the term, and the right to take water from the servient tenement is also an easement, water not being part of the produce of the soil, nor regarded as the property of the owner of the land over which it is flowing. On the other hand profits à prendre entitle the owner not only to enter the servient /

servient land, but also to take something from it for his own use. Our servitudes of Pasturage and Feal and Divot would therefore in England fall under this category. But profits à prendre comprise many rights which are not servitudes in Scotland and fishing, shooting, hunting, and the right to take away game may all be included. The class of profits à prendre most often met with are rights in common, and these Stephen in his Commentaries ⁽¹⁾ divides into five species, viz:- Common of pasture, common of piscary, common of turbary, common of estovers, and common in the soil.

The distinction between easements and profits à prendre is however very considerable. The two are analagous only in so far as neither are ^{is a} corporeal rights, and both include certain rights that we classify as servitudes, and both can be acquired either by grant or prescription. But while easements can only exist in connection with and for the benefit of a dominant estate, profits à prendre may be had in gross. That is, the dominant owner may be entitled to them irrespective of any estate in land, and simply as belonging and having belonged to him and his ancestors. It must therefore be remembered where references are made to English law that while /

(1) Vol 1. page 621

while easements resemble servitudes, the profit à prendre is an entirely different right.

It is obviously impossible to deal adequately with servitudes in the law of Scotland without referring very frequently to the works of Justinian. How far we are indebted to the law of Rome for many of our legal principles and how far these principles are indigenous to our own country is a very difficult question, made more complex by modern theories on the subject. In so far as servitudes are concerned we are faced with the fact that there exists to-day in the law of Scotland a system which is in its main principles identical with that laid down in Justinian's Digest. But to what extent we have incorporated in their entirety the rules of the civil law; to what extent we have altered and modified original customs to make them conform to the Roman doctrine; and to what extent our law of servitudes is the outcome of restraints which must find place in all countries where individual ownership of land is recognised are questions which the scanty evidence of our legal history, and the pro Roman tendencies of our early institutional writers make very difficult to answer.

In this matter the urban servitudes fall into a class by themselves and will be dealt with later; but it will be seen from subsequent remarks that the rural servitudes in Scotland /

Scotland give room for speculation on the question of when and to what extent Roman Law superseded or amplified an existing system.

An ancient body of common law, "the ald lawis and fredomis" of the country, of which we know so very little, existed in Scotland and must not be confused with the law of Rome. In this connection there are the following remarks in the introduction to the second volume of the *Acta Dominorum Concilii*, "Common Law as a phrase in Scotland has sometimes been interpreted as meaning the Roman Law. The present editors are not at all convinced that such an interpretation is tenable. In the general case at least there seems good reasons to maintain that the older implication of the term was restricted by the local and natural bounds. In 1318 communis lex is (1) "perforce of the context to be read as the general Scottish law 'the ald lawis and fredomis' of the land. In 1371-72 jus (2) "commune is the same. A useful fragment from the *Omne Gaderum* expressly sets against the leges imperiales the consuetudines (3) "regni Scotie -----In our Scottish Acts generally the mention of the common form of law was assuredly no citation of /

(1) Acts Parl. Scot. 1. 467

(2) Ibid. 547

(3) Ibid. 730

"of Civil law as direct Scottish Authority, despite the
"existence of abundant general references to - usually
"renunciations of benefit from - the law, canonical and
(1)
"Civil. Common law in Scotland meant those leges et consuetud-
(2)
"ines nostrae to which the baronage appealed in 1320, and
"which in 1503-04 were rigorously vindicated by a declaration
"that the land was 'reulit be our soverane lordis aune lawis
"and the commone lawis of the realme, and be nain other lawis'.
"The jus imperiale to whatever degree contributory towards the
"common law of Scotland was quite a different thing from it,
(3)
"and was expressly cited as such".

When however we seek to determine at what stage the principles of this jus imperiale first began to influence the law of Scotland a wide field of enquiry is opened up. The view generally accepted is that in the fifteenth century we have the first signs of the introduction of Roman Law into Scotland, and while the law of the land still remained on a strictly feudal basis, in the following two centuries its interpretation was becoming considerably changed by the ever increasing influence of /

(1) Acts Parl. Scot. 1. 421, 479, 516, 518.

(2) Ibid 475

(3) Ibid 466

of Roman law. This view has the strong support of Sheriff Dove Wilson who maintained (1) that prior to the fifteenth century the Roman law remained without influence on the general law of the country; (2) that such influence as it had was mainly in the church courts; and (3) that only in the fifteenth century did it assume large proportions as a legal force in Scotland, after which it flourished greatly in the sixteenth⁽¹⁾ and seventeenth centuries.

But while this theory cannot be overturned it is supported chiefly by lack of definite evidence of our earlier legal system, and modern research has raised considerable doubt as to its validity.

If we accept Sheriff Dove Wilson's statement the right of pasturage and of building a 'falda' (referred to on page 52) can have no relation to the similar provisions in the Digest.⁽²⁾ On the other hand is there any room for the suggestion that some faint knowledge of the civil law, aided by trade relations and later by canon law, may have remained in these islands even from the time of the Roman occupation?

On the continent of Europe, contrary to the older belief, throughout the period from the fall of the Empire to the /

(1) Juridical Review 1897 p.p. 365 et seq.

(2) Dig. VIII. 111. VI.

the renaissance, the knowledge and practice of Roman law
(1)
never died. Savigny has made that quite clear. The barbarian
codes and Justinian's works had been widely circulated in the
sixth and seventh centuries and are known to have been in
actual force in parts of Italy until the ninth century; and
in questions of trade and commerce, and wherever one of Roman
descent was a suitor, the civil law was invariably obeyed
and practised. In short, the discovery of a copy of the Digest
at Amalphi when the city was taken by the Pisans in 1135 is
conclusively shown by Savigny to have been quite unnecessary
for the diffusion and revival of Roman law.

But while that may be true of Italy, what of this
country? There can be no doubt that the Imperial rule was
thorough and complete from the wall of Antoninus Pius to the
South, and that the law of the Empire took deep root in the
country. The renowned jurist Papinian, and also Severus had
both lived in Britain. And further, when the armies were
recalled, as Sheldon Amos points out, the British writer Gildas
speaks of the remarkable way in which Roman institutions had
penetrated the country. But after the withdrawal of the legions
there is a complete blank, and hardly any sign can be found
of /

(1) History of Roman Laws in the Middle Ages.

of the knowledge of Roman Law. Must we then understand that all Roman influence was entirely lost in a very short space of time?

It is difficult to believe that a country which had so absorbed the law of Rome could completely forget all its principles, but we must remember that, so far as Scotland is concerned, after the evacuation of the Imperial forces, and until the battle of Carham established the supremacy of the Scots, the country was divided into tribes, subject to their own rules; and internal strife only ended to give place to constant wars with England. Roman ideas and institutions may have survived despite such unrest, but any trace of them throughout this period is very difficult to find.

Various writers, however, have pointed to what they consider relics of the civil law in Britain. Thus Professor (1) Earle attempts to identify the Anglo Saxon charter boundaries with the Roman agrimensorial system on the ground that the boundaries of land in such charters are described by starting from such a point or such an object and passing through a series of stations until the starting point is reached again. This, Professor Earle contends, is just the continuation of the old Roman usage, the formula for which may be seen in the book of Hyginus the land surveyor. But this system of describing /

(1) Land Charters and other Saxon Documents XXVI

describing land is a simple and natural one which might quite easily occur to the mind of a conveyancer without the knowledge of any previous practice. Mention has also been made by legal historians of the laws of the Welsh king Howel Dha (A.D. 940) where the Roman requirement of two witnesses, and exceptions to this rule are stated; and in the laws of Alfred there is an apparent imitation of the lex Julia as to Maiestas.

Such evidence does not give us ground for any conclusive statement. Roman law may have survived to an extent not yet known, but we certainly can find very little trace of it in England and none at all in Scotland. As Professor Mackinnon points out⁽¹⁾ regarding this country, how it was governed, what was its political and social organization, what the actual power of the king, what the legal system and how it was administered we can with difficulty descry before the twelfth century. It is only in the reign of David 1. in the first half of this century that its constitutional features acquire substantial shape. Such light as we have on the institutions of the period is reflected from those of the Celtic race to which the Picts Scots and Britons belonged, and the information must be drawn from the conditions prevailing in Ancient Ireland and Wales.

We are thus left where we started. Some remnants of/

(1) The Constitutional History of Scotland

of Roman law may have existed, but we cannot prove it, and most authorities on the subject arrive at the conclusion that what they cannot find evidence of did not exist, and that Roman law was unknown in Britain shortly after the Imperial rule came to an end.⁽¹⁾

If that be so the next question is when did Roman law find its way back to this country.

The knowledge of Roman law never died out in certain parts of France, and was handed down on French soil from the days of the Roman dominion in Gaul. Provinces in that country such as Guienne, Provence, Dauphiny and Aquitaine were known as pays de droit écrit and from time immemorial were subject to Roman law. Now from very early times trade relations existed between Scotland and France. An important Scots import as early as the reign of Alexander I. was French wine, and the Assisa de Tolloneis (attributed to David I.) gives a long list of articles of trade at that time, many of which obviously came /

(1) See "The fate of Roman law North and South of the Tweed" (1894) Prof. Goudy.

"The Village Community" by G.L. Gomme

"Roman law in England before Vacarius" an article by W. Senior in the Law Quarterly Review 1930.

"The History and Principles of the Civil Law of Rome" by Sheldon Amos.

came from a Southern country. The connection between the two countries was not entirely a matter of commerce, for a long and intimate political relationship existed. At a much later date the Parlement of Paris was taken as the model for the court of Session, but was this the first time Scotland had borrowed a legal precedent from France ? We may venture to affirm that it was not, and in all probability some knowledge of Roman law had been obtained from that country long before the period assigned by Sheriff Dove Wilson.

Further evidence for the early acceptance of the principles of Civil law in Scotland is adduced by the Rev. Thomas Miller in his book on "The Parochial Law of Tithes". Mr Miller is convinced that in the reign of David I. the Civil law was known and practised in Scotland. In the course of his research he discovered a collection of canon law and civil law (*Exceptiones Ecclasticarum Regularum*) given with the authority of that king by Robert, Bishop of St Andrews to his chapter for use in the administration of the diocese. This collection, Mr Miller claims, is the work of Ivo, Bishop of Chartres (1091-1116) the outstanding canon lawyer of the period. In Ivo's works there is to be found not only canon law, but also a great deal of Civil law not found in Gratian, and numerous citations from the Theodosian code, the Institutes, Code /

Code and Pandects of Justinian, and the Novellae, and Mr Miller proves that relations existed between David I. and Ivo. According to Geoffroi le gros, first Abbot of Tiron, David transplanted a large number of monks from the diocese of Chartres to Scotland; some of these David had already induced to come to Scotland through the offices of others whom he had employed for that purpose, and when he went in person to Tiron he brought back with him twelve monks and an Abbot to form the chapter at Kelso, and Geoffroi adds the words "cum lege praemissa". So David brought back with him not only Trionensian monks but the law or conditions that prevailed in the diocese of Chartres which was the sine qua non of planting these monks in Scotland; and as Mr Miller points out in a recent article in the Juridical Review, as David was then in the diocese of Chartres, the lex praemissa would necessarily be the law books of Ivo.

Mr Miller's discovery is valuable, but the fact that Bishop Robert of St Andrews prescribed the Exceptiones Ecclasticarum Regularum for his diocese does not necessarily prove that the work was much used, or that it exercised any general influence in Scotland, and in any case its scope would probably be confined to ecclesiastical matters. But it is /

is certainly suggestive that when in the reign of David 1. we first begin to have authentic knowledge of our country's social life, we find evidence of the king's relations with France and of the use, even though limited, of such a book.

(2)

There are many ways of classifying servitudes.

Roman law divided them into servitudes praediorum rusticorum and praediorum urbanorum . This was a classification which had no special legal effect, though the distinction was a convenient and natural one, and the Scottish institutional writers have invariably accepted it. Other continental countries have not followed the Romans in this matter, and the practice in Scotland of distinguishing between urban and rural servitudes is probably explained by the fact that the urban servitudes in this country have been taken in their entirety from the Civil law and stand in a class by themselves. In the following pages this classification has been adopted, and the rural servitudes being the more ancient, naturally fall to be considered first.

The following remarks by Pardessus make a fitting introduction. "L'origine des servitudesest
"aussi ancienne que celle de la propriété, puisqu'elles en
"sont une modification. La disposition des lieux imposoit
"naturellement aux fonds inférieurs quelques assujétissemens
"envers les terrains plus élevés, et les premiers possesseurs
"des /

"des biens ne purent en méconnoître la nécessité. Lorsque
"l'extension de la culture rapprocha les hommes, et que le
"besoin d'une défense commune forma les premières sociétés,
"l'utilité et la sûreté publiques firent sentir combien il
"étoit nécessaire de restreindre dans certains cas, des
"droits, légitimes en eux-mêmes, mais dont l'exercice absolu
"ne pouvoit avoir lieu sans rendre quelques propriétés
"presque sans valeur. Bientôt les particuliers concurent
"l'idée d'en stipuler de semblables pour leur utilité respective,
"et même pour leur seul agrément. C'est ainsi que la disposition
"des lieux, le besoin social, et la liberté des conventions
"ont fait naître les services fonciers"⁽¹⁾

Rural servitudes represent a natural development. Pardessus in the passage quoted says that their origin is as ancient as that of property of which they are a modification. In all probability they go back even further and servitudes of way, of watering, of grazing and the like are possibly relics of the days when such rights were enjoyed, not as servitudes, but because the land subject to them had no owner or at most a nominal one. In course of time such land would be gradually appropriated, either by sale by the nominal /

(1) Traité des Servitudes Vol 1. 1.

nominal owner or because it was deemed to fall under the "parts and pertinents" clause in the title of a neighbouring landlord. But rights which have been enjoyed for time immemorial cannot be easily checked and probably the new owners could not but allow them to continue. With the growing application of Roman law in Scotland such an extension of one proprietor's right over his neighbour's land would naturally be identified with servitudes. So in course of time, in addition to the ordinary rights of property which are confined to the bounds of a man's own land, the law has recognised the existence as an accessory to them, of certain other rights to be exercised over the property of a neighbour and therefore creating an addition to the dominium of the one owner and imposing a burden on the other. But there are many such rights in re aliena ^{of them} and servitudes form a limited and special class.

As the peculiarities of servitudes will be apparent in the following pages it will be sufficient to mention briefly the main features which distinguish them as a class from other rights in re aliena. The outstanding characteristic of a servitude is that it is enjoyed by the owner of a particular property as such over the property of a neighbour. There must therefore be two distinct tenements owned by different persons, for nulli res sua servit; and the right passes with the land or praedium /

praedium and cannot be separated from it. What exactly the term praedium includes besides land and houses is a difficult matter to determine. Can salmon fishings for example be regarded as a praedium which would entitle the owner to exercise a right of servitude in respect of it? This is a question which has not yet been settled, but there appears to be no reason why salmon fishings should not give rise to such a claim.

No obligation lies upon the owner of the servient tenement to execute repairs in the interest of the dominant. Servitus in faciendo consistere nequit, and all the servient owner has to do is to suffer the exercise of the right, being merely restrained from these acts of ownership which would conflict with the servitude. The idea of repair by the servient owner is utterly foreign to the conception of servitudes and even if expressly stipulated for will not pass against a singular successor unless it appears in his titles. There are exceptions to this rule in respect of Thirlage and the urban servitude oneris ferendi which will be dealt with later.

Inter alia the law of servitudes includes rights of pasturing cattle, and watering, and having a road over the servient tenement: it even includes rights of taking part of the substance as feal and divot, clay and the like for the service of the dominant owner, but when a proprietor is entitled to /

to fish or hunt or promenade or gather fruits and flowers on the lands of a neighbour the law for no very clear reason declares the right to be one of use and not of servitude. How far a right of sport and enjoyment can come within the category of servitudes is therefore a question which merits some consideration.

The civilians were quite satisfied that a servitude could not exist for the mere personal profit or pleasure of a neighbour, but only for the use of the dominant tenement. In consequence if there existed a servitude of taking clay for making vessels the right did not allow clay to be taken for their manufacture for purpose of sale.⁽¹⁾ In the same way the pleasure and enjoyment of a proprietor in the lands of his neighbour could not be elevated into a servitude. "Ut pomum decerpere liceat, et ut spatiari, et ut coenare in alieno possimus, servitus imponi non potest."⁽²⁾ In a later passage the right of boating is mentioned, but this was a servitude only in so far as it was a means of access to the dominant estate, and was in no sense a servitude of sailing about on another's lake.⁽³⁾ So we can be certain that such a right as that of playing golf on neighbouring land would never in Roman /

(1) Dig. VIII 111. 6

(2) Dig. VIII. 1. 8

(3) "Si lacus perpetuus in fundo tuo est, navigandi quoque servitus, ut perveniatur ad fundum vicinum, imponi potest". VIII.111.23.

Roman law have been a servitude praediorum rusticorum.

In France the question of whether or not rights of hunting and fishing can be regarded as servitudes has not yet been definitely settled. Nearly all the French jurists refuse to regard them as such on the ground that they are personal pleasures and not for the benefit of the dominant tenement. But by an arrêt of the cour de cassation of 4th January 1860 a right of hunting was established as a servitude. An arrête of the cour de cassation of 9th January 1891 declared the existence of a servitude of hunting as impossible but this decision was by the chambre criminelle and the Civil Court has not yet made a pronouncement on the question.

In Scotland the law on this subject is peculiarly inconsistent, for while hunting, fishing and other forms of sport on a neighbour's land have been declared outside the category of servitudes, it would appear that a servitude of golfing can be created.

Barony titles were invariably granted with the right of hunting, hawking and fishing - cum venationibus, aucupationibus et piscationibus - and when the landlord granted portions of his estate to others his hunting hawking and fishing were usually reserved. ⁽¹⁾ There can be no doubt of the antiquity of such sporting rights in Scotland. But any attempt /

(1) See the case of Earl of Aboyne v. Innes
22nd June 1813.

attempt to establish them or any other form of sport as servitudes has been overturned. Golfing is the one exception.

The Magistrates of a Burgh may be the dominant heritors of a rural servitude for the use of the inhabitants (1) of the town and it has been burghs in this capacity which have raised actions for declarator of servitudes of playing golf. So in one of the earliest cases the demand for the recognition of a servitude of a similar kind was dismissed because there was no dominant tenement. The case related to Bruntsfield Links. Fairholm of Greenyards enclosed a part and planted it, and the proprietors of the adjacent houses complained to the court that they and their predecessors had acquired a servitude spatiandi, and of amusing themselves, on the whole of the links, and that they could not be deprived of any part of it. The lords declared however that personal servitudes are unknown in the law of Scotland, and there must in /

(1) Wolfe Murray v. Mags of Peebles 8 Dec 1808. No identical state of affairs existed in Roman law: but in practice the use of a servitude must often have been not dissimilar. If a wealthy Roman was the dominant proprietor his slaves, his household and his visitors might be very numerous, and all were entitled to enjoy the servitude, so that in consequence the dominant owner held the right for behoof of many people. "Usu retinetur" "servitus, cum ipse, cui debetur, utitur, quive in "possessione eius est, aut mercenarius, aut hospes, aut "medicus, quive ad visitandum dominum venit, vel colonus, "aut fructuarius". Dig. Vlll. Vl. 20.

(1)
in any case always be a dominant tenement.

The first action of declarator of a right of
playing golf came, as might be expected, from St Andrews. In
1797 the magistrates and Town Council feued the links to the
Earl of Kellie under a reservation of the right of the
inhabitants of playing golf on them. But the links were let by
Lord Kellie to a tenant for use as a rabbit warren and then
the trouble started. The rabbits multiplied and soon threatened
to ruin the course, and at last several prominent townsmen
raised an action to have it declared that the inhabitants of
St Andrews had the right to resort to the links to exercise
the privilege of playing golf. (3) It is impossible to follow here
the whole cause of this action. The case was never finally
settled but it had the effect of preserving the golf links
from the rabbits and of establishing the right of the townspeople
to exercise their privilege of golfing.

(4)
The next case relates to Earlsferry links and
properly /

(1) Cochran V. Fairholm 8th Feb. 1759 Dic. 14518.

(2) A paper on servitudes of golfing by Mr J. Gordon
Dow was read at the annual meeting of the Scottish Law
Agents Society on 10th October 1930 and is published in
the Scots Law Times 1930 Page 177.

(3) Cleghorn & Ors. v. Dempster 1805 M. 16141; 1813,
2 Dow 40 (H of L).

(4) Mags of Earlsferry v. Malcolm 1829, 7 Shaw 755:
1832, 11 Shaw 74.

properly establishes a servitude of playing golf. In the St Andrews case the right was exercised over land belonging to the Burgh, but in the latter case it was claimed over neighbouring property, and it was found that by immemorial possession the inhabitants of Earlsferry had acquired the servitude of golfing, and the Court of Session remitted the case back to the Sheriff "to settle the best and most convenient track for the exercise of golfing."

But a servitude of such a kind as golfing is anomalous and rare. Let us therefore pass on to the consideration of these particular forms of rural servitudes which have played a more prominent part in the law of Scotland. In view of its many peculiar features, and its former importance, the so called servitude of thirlage first claims our attention.

Various Rural Servitudes

Thirlage

Thirlage, described by Stair as "the chief and most frequent servitude in Scotland" is now of little more than antiquarian importance, but in that sphere it does hold much to interest a student of legal antiquities.

It was a servitude peculiar to feudal countries and without parallel in Roman Law and this encourages the explanation of its origin as a corvée of the Norman barons. While characteristic of feudalism the corvée was of much earlier origin and had in a sense been developed under the Roman Empire; and some relationship to thirlage can be traced in the system of personal services (operae) which were due from certain classes of the Roman population not only to the state but to individuals. On the other hand Professor Bell suggests ⁽¹⁾ that thirlage was devised originally as an expedient for indemnifying the builder for extraordinary outlay in a rude age, which degenerated in times of more improved manufacture into a burdensome and inexpedient tax on the produce of land. It developed /

(1) Bell's Principles 1017

developed certainly into a valuable trade monopoly which any heritor whose lands were not astricted could impose on his tenants.

Originally only the Crown would have the right of thirling lands to a mill but the privilege was early granted to subject superiors. The grant in molendinis was one of the oldest pertinents of a barony, and carried as a rule the additional benefit to the baron and burden on the dependent peasants of multure dues - cum multuris et sequelis. But the smithy - fabrina - and the brew-house - brasina - and other adjuncts of a barony also existed, and while there appears to be no reason why lands astricted to a smithy or a brewery should not have given rise to similar rights, thirlage remains a unique example of this type of servitude.

Considerable doubt has always been expressed as to whether or not thirlage can truly be classified as a servitude. It is much more of the nature of a contract; or of a restriction in the nature of a tax. The sucken had to do something positive /

positive which offends the maxim servitus in faciendo consistere nequit and Lord Deas described it as "an anomalous right as much allied to petty customs as it is to servitude.

The French law of the old regime provides an interesting and instructive comparison. In France there were "Moulins banaux" which were mills to which those subject to the Seigneur of the district were obliged to carry or send their grain to be ground ⁽¹⁾ and for grinding the miller of a "moulin banal" took a quantity of grain which as might be expected was quite out of proportion to the service rendered.

This droit de moutre was included in the more general category of Banalités. Bonhier defines a banalité thus:- "le droit d'interdire a ceux qui y sont sujet la faculté de faire certaines choses, autrement que de la manière qui leur est présente, sous les peines portées par les lois, les conventions ou les coutumes." The banalités comprised certain rights in connection with mills, bake-houses, and wine presses, the effect being in the main two-fold, for the peasants were compelled /

(1) Merlin: Répertoire Universel et Raisonné de Jurisprudence. t XI p. 322

compelled to come to the seigneurial mill, bake-house or wine press to have their work done, and were also hindered from constructing any other mills, bakehouses or winepresses. So far the resemblance to Thirlage is very evident.

The nature of banalités has however been the subject of much controversy among French Jurists. The general feeling was that they were a kind of servitude, but to this there were objections. Dumoulin, for example, propounds the theory that they were personal rights having their source in a reciprocal obligation of the type facio ut facias. He would appear to arrive at this conclusion from an implied obligation of the following kind:- 'You are obliged to repair and keep in order 'such a mill and we oblige ourselves to come to you to have (1) 'our grain ground and not to construct another mill'.

In reality banalités were never recognised as servitudes proper. This is evident from the fact that none of the jurists have included them in works relating solely to servitudes, regarding them rather as feudal rights. The matter is /

(1) See Merlin, Répertoire t. XI p. 323

is now of no practical interest for French law was purged drastically of such impositions by the enactment of 17th July 1793. But the resemblance to Thirlage is striking.

In Scotland, however, the position is different and there is a predominance of authority that Thirlage is a servitude, though a peculiar one.

Mills had long been the subject of special concern in Scots law. A mill in Scotland was a distinct tenement from the land and not comprehended under 'parts and pertinents' unless in the case of a barony when the mills on the land would be carried by the infeftment. Otherwise mills required special seisin and were feudal fees.

Both Stair and Erskine explain that Mills originally were built without any astringency or thirlage and that the grinding of corn constituted the proper contract locatio operarum, no one being obliged to have his corn ground there. (1)
Stair adds that afterwards there were agreements between the proprietor of the mill and some of the neighbourhood whereby
a /

(1) Institutes 4, 15, 1.

a portion of the grain grinded was agreed to be given and taken for the hire of that service, without which agreement those who also came to the mill were understood to be obliged to pay the ordinary hire or multure, and in either case there was no more than a personal contract of location. But we know that the servitude was early introduced into Scotland whereby lands were astricted to a certain mill and the tenants were forced to pay a multure or hire far exceeding the value of the work. Heritors were accustomed to astrict their tenants to their own mills and the multure became in short an additional rent which they had to pay, and in most cases a grievous burden. Stair's explanation that the multure gradually developed from a fair payment for work done is a little difficult to reconcile with the following quaint enactment which is to be found as far back as in the Assise Regis Willelmi "If a man who buys corn in one lordship and carries "it to another stay there at the tavern to eat and drink, he "shall be free of multure if he put his sack in the king's way "but /

"but if he put it within the house or on the midden he shall
"pay multure".⁽¹⁾ So even at this date the multure did not have
the appearance of a payment for service rendered. We certainly
know that in practice the multure at an early period had little
relation to the work which the miller did for if the mill was
unable to work through frost or the breaking of the dam, or
the mill stream drying up in the summer, but by no fault of
the miller, and the grain had to be grinded elsewhere, multures
were still due though the smaller duties were not exigible.
In short the multure had become a rent or tax and the sequels
represented the hire.

Stair appears anxious to make it clear that Thirlage was
not an unfair imposition. "There is" he says⁽²⁾ "no ground of
"complaint, how great soever the multure be, the rent must be
"the less." But thirlage was an obstruction to agricultural
improvement and was accompanied by annoying services and
tenants could not but grudge improving their farms when their
profits were so heavily taxed. The servitude of thirlage
probably /

(1) "gif ony byis corn in a lordchip and passis in ane
othir lordchip and makis remayn thar at tabyll til
et and drynk and puttis his sek in the kingis gat
he sal be quyrt of multer And gif he puttis his sek
wythin hous or upon the midden he sal pay multer."
Ref. Ass. Will. C.35, 1.

(2) Institutes 4,15,3.

probably explains to a certain extent why Scotland was so backward in agricultural methods in the 17th and 18th Centuries.

The Duties on the astricted lands

Multures, Sequels and Services comprised the duties to which the lands astricted to a mill were liable. The multures (moliturae) varied from $\frac{1}{30}$ th to $\frac{1}{12}$ th of the grain either in manufactured form as meal flour or sheelings &c. or in kind as oats, wheat or peas &c. They were of three types, outsuken or outen-town multures, dry multures, and insucken or in-town multures.

Outsuken multures were payable by those who came voluntarily to the mill and whose lands were not astricted. They usually represented a fair payment for the work done though the rates might vary in different districts, and were quite high where mills were scarce. The usual rate was a peck in six firlots (one-twenty-fourth).

Dry multures were duties in grain or money payable annually /

annually whether grain was ground or not. The object of constituting a payment pro aridis multuris would be to ensure a receipt even if the proprietor ceased to till the ground, as otherwise he having no grain would have nothing to bring to the mill, and no multures would be exigible. When thirled lands paid dry multures they were free from the obligation to resort to the mill and the amount ought to represent the difference between the outsuken and the insuken rates.

The insuken multures were payable by those whose grain was grinded at the mills to which their lands were astricted and the rate in this case was frequently a peck in the boll (one sixteenth). Quite often lands in the same thirl paid different rates and some might be astricted on terms as low as the outsuken payments while a neighbour paid even more than a sixteenth and we can be sure that such distinctions would often be a source of grievance to Scottish tenants.

Besides multures a fee was due to the servants at the mill which took the form of a small parcel of meal or corn. These /

(1)
These payments were the sequels. By a Statute of William every mill was required to have a master and two servants. The payment to the master was called knaveship and the payments to the servants were Bannock and Lock or Gowpen, and their quantity was regulated by usage and not generally expressed. It was decided in an action for abstracted multures that even though there could be no work done which would entitle the servants to the sequels, nevertheless these duties were payable because the pursuer's right was to the whole multures cum eorum sequelis usitatis et consuetis and servants had to be kept at the mill to serve the defenders were they to come. (2)
So the miller's job must often have been both easy and remunerative.

8. Finally there were exigible a number of varied and what must often have been irritating duties known as services which formed a kind of accessory to thirlage. These services were regulated by custom though it was not necessary to prove their exaction for a prescriptive period before they could be demanded /

(1) XXXV. Thoms. Acts. 1, 59.

(2) Adamson v Tenants 22 March 1628 M. 15965 Sup.1.221.

demande. If the mill dams, for example, were repaired on one occasion by the suken, the anterior years custom was presumed. It was even found that the heritor of a mill had in consequence of the astringent right to mill services although the heritor might not have called the suken to those particular services for the space of 40 years ⁽¹⁾. The constitution of thirlage with multures and sequels by the nature of the right included the ordinary mill services, and that without relation to possession, so that immediately upon the constitution of the servitude these could be demanded. ⁽²⁾ Nor was it necessary that the customary services should be expressed, for they were implied in every sort of thirlage and passed without mention ⁽³⁾ to singular successors.

The usual services consisted in bringing home the Mill: ⁽⁴⁾ stones repairing and upholding the mill dams and water gates ⁽⁵⁾ and in carrying materials for repair of the mill-house. It was also decided (after a previous contrary judgment) that ⁽⁶⁾ furnishing of thatch for the mill was inherent in a thirlage.

In /

- (1) Mercer v Drummond 31 July 1725 M.16015
- (2) Maitland v Leslie 27th Febry. 1668 M.15978
- (3) Ld. Newliston v Inglis 17 July 1629 M.15968 & 10852
- (4) See Innes' Legal Antiquities
- (5) Crawford v Halkerston 16 Dec. 1732 M.16016.
- (6) Bruce - Stewart v Erskine 17 Nov. 1741 M.16920

In short the services covered nearly every requirement necessary to keep the mill in good working order. How irksome these duties must have been can be judged from the litigation they produced. The average tenant could not afford to take his grievance to Court yet Morrison reports many cases of contest: ed services, and the decisions tended to extend rather to restrict their scope.

The three kinds of thirlage

Thirlage differed in its effect according as the grant was one of all growing corns - of omnia grana crescentia; or of grindable corns; or of all corns brought within the thirl - invecta et illata.

While "all growing corns" comprehended the whole grain grown on the astricted lands certain corns were excepted from liability to multure dues. In one case it was held that wheat was not included, none having been sown on the lands at the time of their astriction. ⁽¹⁾ Multure was never due from horse ⁽²⁾ corn ^(2a) nor from seed corn on the principle that these were needed /

- (1) Marquis of Abercorn 13 Feby. 1798 M. 16074
- (2) Stewarts 3 Jan. 1662 M. 15974 & 10854
- (2a) Ld. Fordel 12 July 1565 M. 15959

needed for raising next season's crop. Nor were they due from the feuduty or rent when such was payable in victual, not converted, to the owner of the mill ⁽¹⁾, for it was not presumed that the landlord meant to burden with a servitude the grain deliverable to himself. But nevertheless if the rent was payable in manufactured form, as flour, this result was automatically effected, for the tenant could have the grain with which he was to pay the rent grinded no where else than at the landlord's mill and accordingly multure dues were payable on it. ^{ei} ~~Tiends~~ also, not being decimae inclusae, and not converted into money, were excepted. They were held to be free of multures de sua natura. ⁽²⁾ They might however be expressly astricted or proved liable to multures by prescription.

The thirlage of all grindable corns growing on the lands would appear from the words to import an identical servitude with that just treated, but in practice there was some distinction for the thirlage of grana molibilia meant astriction /

(1) Feuars of Gaitmill 1688 M. 10770

(2) Innerwick 1635 M. 15972

restriction of so much of the corns growing on the lands as was used or needed for consumption within the thirl and all the surplus might be freely exported. But if the occupier bought corn to be ground for consumption he required to have it ground at the mill of the thirl - a restriction which⁽¹⁾ would encourage him to buy the finished article in the shape of meal. So this thirlage could be evaded by the servient tenement being thrown into grass and meal being bought to provide for the families. But the occupier could not evade it by selling his corn, if he had any, and buying meal instead.

How the thirlage of all grindable corn could operate as a burden on urban property which no one would now associate with anything so rural as a mill can be seen from the following example. Gargunnock, proprietor of the village of Saltcots in 1703 feued out some houses, and some pieces of ground 40 or 50 foot square adjacent to the houses, which were of no other use but to be kail-yards. In the feu dispositions /

(1) Cockburn 1686 M. 15988

dispositions he thirled the feuars "to come to the mill of
"his barony with their grindable corns and malt and to pay the
"multures and services conform to the use of the barony". The
feuars naturally objected to such an imposition on their kail
yards. At the best they had been recovered from the sea, and
were not fit for tillage so they argued that the thirlage was
one of grana crescentia in which event they could have had
nothing to pay. However the Lords found the feuars liable in
payment of multure not only for all grindable corns growing
within the thirl but also for all corn which they should bring
into the thirl to be consumed there, and for all malt whether
grinded or not brought in and brewed within the thirl.⁽¹⁾

The form of thirlage specially applicable to towns
was that of invecta et illata. Where a barony included a burgh
of barony, a general astringency imported ordinarily the thir:
:lage of grana crescentia in the rural part and of invecta et
illata in the burgh. Corn might therefore be grown in the land:
:ward district on which the multure grana crescentia was
payable /

(1) Hamilton v Millar 27 Dec. 1717 M. 16012

payable and then be imported into the burgh for the use of the inhabitants and become liable under invecta et illata but it (1) was held that such corn was not subject to the double multure and having paid once to the mill it was thereafter free. This decision was based on the argument that the same corn could not be manufactured into meal twice at the one mill. But illogic: ally the argument did not extend to the case where the corn was liable to the multure grana crescentia at one mill and invecta et illata at another, for in these circumstances the grain was subjected to a double thirlage, and paid twice.

When the thirlage of invecta et illata was constituted the words describing the subject astricted were "all grain "brought within the ground that tholes fire and water therein" - quae ignam et aquam patiuntur - and this ordinarily was interpreted to mean grain for kilning and steeping or cobling (2) and not baking or brewing i.e. the fire and water which prepares the grain for the mill and not the process it goes through after it has been ground. But the nature of the thirlage /

(1) Steedman 1722 M. 16013 reversing a previous decision

(2) Stair 2, 7, 20.

thirlage of invecta et illata varied according to the terms of the astriction and the custom of the thirl.

Such were the three kinds of thirlage. Which individual one was applicable in a particular case was determined by usage, the universal test; but if there was still doubt praesumendum est pro libertate. By their nature however they were applicable to different subjects and the thirlage of invecta et illata would naturally be understood when a village or burgh was astricted, and omnia grana crescentia in a country district⁽¹⁾.

Relating to the Constitution of Thirlage

Apart from the exceptions aftermentioned thirlage was constituted only by writing, it might be by a bond of thirlage or in the titles of the dominant tenement, or in the titles of the servient tenement, and every landlord could astrict his own lands by any proper obligation. Mere resort to a mill for no matter how many years did not constitute thirlage. But here a distinction must be noticed between the constitution of the servitude and the proof of the constitutions - two things which are often confused.

Thirlage/

(1) Lord Kilkerran v Blair 18 June 1755

Thirlage could be constituted only by the act of the proprietor. It could not be constituted by prescription alone. But proof of constitution was possible in certain cases by evidence of prescriptive usage. For example a writ was not necessary for constituting the obligation when lands were thirled to the King's mill, the king's own original right being constituted jure coronae without written title. Nor was a writ necessary for astriction of lands to mills belonging to church lands, for by the operation of the Act of Sederunt 16th December 1612 thirty years possession of Church lands by churchmen was deemed equivalent to a written title. The exception to the need of writing was extended to the thirling of barony lands to the mill of the barony. Why this should be so is more difficult to explain, but probably it originated in days before writing was common, when the word of the baron had the weight of law and his verbal order was quite sufficient. In all other cases thirlage required writing for its constitution.

The /

The effect of this is now apparent in the proof of the constitution of the servitude, for it followed that in the case of the king's lands, kirk lands and barony lands the only proof required was proof of resort, and of payment of the insuken multures for the prescriptive period. In one other case prescription could operate to prove the astriction. The payment of dry multures was held so inconsistent with the freedom of the lands that payment of those for forty years was considered conclusive evidence of the due constitution of the servitude. Payment of insucken multures without further evidence had not this effect.

There were indeed certain titles called titles of prescription, which, coupled with long possession constituted thirlage, and which thirlage got the name of prescriptive thirlage. These were titles which were so weak that they could not themselves constitute the servitude, but following on them the practice of going to the mill for forty years was construed to be in consequence of a properly effected astriction. Thus while /

while neither the title nor the custom by themselves could create the right, together they were effective.⁽¹⁾ But if the astriction was clearly stated in the titles of the lands, in a disposition or in a charter, no proof of possession was required, for the vassals could not prescribe a freedom contrary to the burdens in the writs.

If the tenants attempted to deny the obligation the heritor of the mill could raise an action of declarator of astriction. If they did not deny the obligation but evaded it by taking their grain elsewhere the remedy lay in an action of abstracted multures. At one time a more primitive form of redress existed, for if a tenant was caught in the act of carrying his grain to another mill, the overlord took the suckener's horse and the miller the sack and corn.⁽²⁾ This some:⁽³⁾ what drastic remedy was declared to be in desuetude in 1635.

10 No attempts by the suckeners at grinding their own grain would be tolerated in the thirl, and hand mills or querns were stamped /

(1) Erskine, Inst. 2, 29.

(2) "gif ony be wont to pas in private to ane other milwyth his corn wythoutyn lef of the millar and in that he be tane be the lordis servande the lord sal haf the hors and the millar the sek and the corn." Ref. Ass. Will. c. 351.

(3) Menzies 1635 M. 1815.

stamped out with rigour. The inhabitants of the town of Falkirk for example, set up steel mills for grinding malt which were ordered to be removed in ten days or otherwise to be destroyed⁽¹⁾ But on caution being found not to grind the grains which were thirled, a mill might be erected for other purposes on astricted lands.

Commutation and its effect

In course of time it began to be recognised that such restrictions as thirlage imposed were not only archaic but were a drag on the advance of agricultural methods. The act 39 Geo. III. C.55, after narrating that thirlage and its incidents "are very unfavourable to the general improvement of the "country" provided for a commutation to an annual payment in grain fixed by a jury of nine heritors, under a petition to the Sheriff. Provision was also made for a thirlage of invecata et illata being purchased outright by the inhabitants of villages and burghs subject to it.

This statute instituted a fixed annual payment, but was /

(1) Feuars of Falkirk v The Millar 19 July 1744 Elch.
h.t.l.

was such payment to operate as an extinction of the servitude of thirlage quoad the lands of the heritors, or merely as a liquidation or ascertainment of the amount to be paid annually by them in respect of that servitude, upon the footing that it still continued to exist? Lord President Balfour ^{Keirson} deals with this question ⁽¹⁾ and after a careful examination of the statute is of opinion that the effect of proceedings being taken under this Act is to extinguish the servitude of thirlage in consideration of the payments.

The Act 39 Geo. III. C.55 does not apply to dry multures. By payment of dry multures the suckeners were freed from the obligation to resort to the mill. Such payments were in short an early form of commutation of the thirlage, and as such they may be regarded on the same footing as the statutory payments. Thus they are not an annual sum in respect of the servitude, but a commutation involving its extinction.

It follows in the case of payments under the statute and of payment of dry multures that though the owners of the mill /

(1) Porteous v Haig 1901 3 F. 347

mill may fail to maintain the mill, or may remove it entirely the obligation to pay still remains, as, the servitude having been extinguished, the mill ceases to have any relation to the payments. So it was decided in the case of *Porteous v Haig supra*, and the more recent cases where thirlage has come under judicial cognisance have all raised the question of the relation of payments in respect of multures and a mill which has ceased to function or even to exist.

(1)

In the case of *Forbes Trustees v Davidson* by deed of submission dated 1814 between "proprietors connected with the "sucken and thirlage of the meal mill of Nairn" on the one part and the proprietors of the mill on the other, the multures, sequels and services to the mill were commuted to a fixed annual payment, and the mill owners undertook the whole responsibility for keeping the mill in order in all time coming. This represents the reverse of the rule of *Porteous v Haig* for here the effect of the agreement was to fix the amount to be paid to the dominant proprietors in respect of a continuing /

(1) 1892, 19 R. 1022

continuing servitude. Accordingly when in 1878 the mill was sold with the multures, sequels and services thereof, and the purchasers demolished the building and had no intention of rebuilding it, it was held that the liability to pay the annual sum ended. On the other hand in the case of the ⁽¹⁾Magistrates of Edinburgh v Edinburgh United Breweries Limited where agreements had been entered into for the payment of a definite sum in lieu of (and not in respect of) thirlage and multurage, the defenders were liable for arrears of multures though at the date of the action and during the time when arrears were due none of the mills were in working order. A ⁽²⁾similar result was reached in Gordon's Trustees v Thomson but on different grounds for in this case the terms of the agreement entered into had constituted a real burden on the servient lands involving payment even though the services of the mill were not afforded.

These recent cases bring thirlage up to date, but they also mark the close of a chapter of our law. In every respect thirlage /

(1) 1903, 5 F. 1048

(2) 1910 S.C. 22.

thirlage bears the stamp of a feudal imposition. Like so many other relics of feudalism in the law of Scotland, it persisted long after the baronial power had ended. The modern lawyer versed in the principles of individual liberty, freedom to trade, and a system of land tenure which has been cleared of nearly all the old impositions has difficulty in appreciating the prevalance it once had. In recent years Act of Parliament in no uncertain fashion has freed our law from many feudal burdens. But despite the Statute of George III thirlage really died a natural death. With changed conditions and modern methods of agriculture it could never have survived, and it now belongs as much to the past as soccage and ward holding.

PASTURAGE

The right of pasturage in Scotland is probably a relic of an earlier system of land tenure which persisted under Feudal law as an important servitude, an importance it maintained as long as primitive methods of farming prevailed; and only with the advance of agricultural ideas has it lost its prominence. It is not surprising to find that it once ranked among the most frequent servitudes in the law of Scotland, a position it has lost during the last hundred years.

Pasturage may be described as a rural servitude whereby the owner of the dominant tenement is entitled to pasture a determinate⁽¹⁾ number of cattle on the grass grounds of the servient tenement, and it therefore corresponds to the jus pascendi pecoris of Roman Law. But we are not entitled to assume that it owes its origin to that servitude. There is an undue tendency to trace to a Roman origin all institutions having any analogy to some branch of the civil law. Very early references to the right of pasturage can be found and in all probability /

- (1) The grant may however be indefinite as to the extent of the right in a common, when the right is then not unlimited but restricted to the number of cattle which each of the dominant proprietors can fodder during the winter on the dominant lands.

probability an original custom of grazing in common continued in our country as a right which new systems might limit but could not abolish. It must further be borne in mind that in Scotland vast expanses of land were formerly available for common grazing. The arable land which had been early appropriated and held by charter was a narrow strip on river banks or beside the sea but the inland and the moors and the mountains were not utilised at all for agricultural purposes, and served only to keep the poor and their cattle from starving. It was only as cultivation increased that these stretches were gradually absorbed by the barons who claimed them under their clause of "mosses and moors, parts and pertinents"⁽¹⁾.

Though the jus pascendi pecoris was a well known servitude of Roman law there are only brief references to it in Justinian's Digest. Mention is made of the fact that one having this right could erect a hut on the servient tenement as a shelter in the event of a storm; and in Roman law if there was no special agreement as to the extent of the right it could only /

(1) See Innes' Legal Antiquities.

(2) Dig. Vlll. 3.6.

only be exercised for the number of beasts attached to the dominant property. It is also stated that the servitude attaches to the estate rather than to the person then follows the passage "si tamen testator personam demonstravit, cui "servitutem praestari voluit, emtori vel heredi ejus non eadem "praestabitur servitus."⁽¹⁾ From this somewhat ambiguous text it would appear that the servitude might be bequeathed to a particular person apart from the ownership of a dominant tenement, and that it could become a personal servitude and a kind of usufruct. If this be so it is interesting that in Scotland also there existed a special case of pasturage where⁽²⁾ there was no dominant tenement. By the operation of Statute Ministers were entitled to pasturage and rights of fuel feal and divot over the lands of another, not as proprietors but simply in virtue of their benefices, and this is the only instance of a servitude (if we can so describe it) constituted on a predial tenement without a proper dominant tenement to which it was due.

We /

(1) Dig. VIII.3. 4.

(2) 1593 c 165 and 1663 c 21.



We find the servitude obtaining in later Roman Law and reference is again made in the Calabrian Procheiron to the fact that anyone who has a servitude to pasture and water cattle on a farm can acquire the right of building a shed on it ⁽¹⁾. It is remarkable that we find in a very early reference to the right of pasturage in Scotland a similar privilege of erecting buildings. The Acts of the Parliaments of Scotland in the reign of William I. ⁽²⁾ contain a Quitclaim by Richard de Moreville in favour of the Monks of Melrose of the right 'de bosco et pastura' in the forest between Galhe and Leder, with reservation to himself of the wood ⁽³⁾ of Threpwude 'sine pastura' the monks to have the right of building a 'vaccaria' for 100 Cows and a 'falda'.

There is little doubt that the right of pasturage over the lands of another or over the lands of one whose right was nominal having its origin in earlier forms of land tenure and more primitive methods of agriculture has persisted in some form in most European systems. In France there existed the "Servitude /

(1) Provincial Manual of Later Roman Law. Freshman p. 62

(2) A.P.S. 1180, 1, 387 b.

(3) Woods differed from forests and were not subject to the restrictions mentioned infra.

"Servitude de Pacage". Pardessus describes it as divisible⁽¹⁾ that is it could be enjoyed partly by one person and partly by another for the determinate number of cattle being divisible so was the servitude. If the right of pâturage existed in a wood (as was often the case in France) and if it was necessary to build enclosures to keep the animals from straying on to other lands, the obligation to erect such enclosures was on the servient owner. The right of pâturage arose as a result of individual consent given by the proprietor of the servient lands, or it might in certain cases be acquired by prescription. It also was often reciprocal, A having the right over the lands of B while B enjoyed a similar right of pâturage over the lands of A.

An interesting form of pasturage which existed in France and which has no parallel in our system was that known as⁽²⁾ "Vaine Pature". It consisted in the right of pasturing herds on unenclosed lands after the harvest had been reaped and until the crops were again sown. It was originally a rural custom /

(1) Traite des Servitudes Vo. 1. Sec. 23.

(2) See "Traité élémentaire de droit civil" Planiol and Ripert. Vol. 1. 2430 and 2385.

custom, but from it there arose in certain districts at least an actual servitude over the ground subjected to it. "En
"principe " says Pardessus ⁽¹⁾ "le droit de faire paître des
"bestiaux sur le terrain d'un autre ne peu être exercé que
"par celui qui a legitiment acquis ce qu'on nomme une servitude
"de pacage.....Néanmoins dans plusieurs provinces les
"habitans d'une commune jussent de la faculté de faire paître
"leurs troupeaux ou bestiaux sur l'heritages dépeuilles de
"leurs fruits naturels ou industriels: c'est ce qu'on appelle
"'vaine pature' ". Cette faculté entendue d'une commune à une
"autre, et créant entre ces communes une reciprocité de vaine
"pature, porte le nom de parcours et quelquefois entre-cours,
ou marchage." Vaine pature, and the seigniorial "droit de
"chasse" were the two rights which had the effect of hindering
proprietors from enclosing their lands, as the existence of an
enclosure would have hindered the free pasturage of animals,
but this did not apply to the territories of the nobility as
their domains were "en defense" and closed to the public all
the /

(1) Traité des Servitudes" Vol. 1. Sec 132.

the days of the year.

This servitude was a means of utilising fallow lands, which might often be unsown for many years, but with the advance of agricultural methods vaine pâture became a hindrance and an obstruction to progress. But the absolute abolition of the right might have caused hardship and have deprived the poorest of the peasantry of their only means of support for their cow in the winter, and thus eleven departments voted for its continuance in 1853, and even to this day the system has supporters in the "Société des Agriculteurs". However an attempt has been made to recognise both sides of the question and without abolishing the right, it has been much restricted. "Cette vaine pâture n'étant qu'une tolérance de la loi ou de l'usage peut être éteinte.....par cela seul que le propriétaire convertit son héritage en une espèce de culture que la loi ou l'usage en affranchit; ou bien que ce propriétaire, en la laissant dans son état primitif, l'enclôt de manière à annoncer qu'il veut y interdire la vaine pâture".⁽¹⁾

In /

(1) Pardessus, Traite des Servitudes Vol. 2. Sec. 320

In 1791 it had been enacted that "le droit de se clore
"ne peut être contesté a aucun propriétaire" with the result
that vaine pâture ceased to be an obstacle to the natural
right of a proprietor to enclose his ground. In Art. 647 of
thw Code and also by the law of 9th July 1889 it was further
declared that all enclosed ground was freed of vaine pâture. ⁽¹⁾

In England grant or prescription might create a right of
pasture in gross which gave the grantee and his heirs, inde:
pendently of the possession of any land or pasture by them,
the right of turning a definite and limited number of cattle
upon the land over which the right of common is claimed. This
of course is not an easement.

Some indication of the old practice in Scotland can be
gathered from the statement by Stair:- "the promiscuous use
"of pasturage in the winter time accustomed in many places in
"Scotland.....are mainly permitted as of little moment
"or disadvantage; and therefore may be denied without injury.
"And so by Act 11. Parl. 1686 all persons are ordained to
"herd /

(1) The servitude of vaine pâture bears analogy to the
profit a prendre of "common of shack" of English law,
which was a right of allowing beasts to graze in a
field as a common field after harvest, though the
field actually was owned by different owners.

"herd their horse and nolt all winter in the day, and house
"them in the night; and half a merk is appointed for every
"beast taken by any person on their own grass before the
"beast be redelivered".⁽²⁾

An outstanding exception to the "promiscuous use of
"pasturage" in Scotland existed in respect of forests. Forests
were inter regalia. They were for the king's use and pleas:
:ure in hunting the deer, and any cattle found pasturing in
the precincts were escheat to the Crown. Even though a Baron
might have a grant in liberam forestam whereby he obtained the
right to hunt deer, nevertheless as far as the king was
concerned he was looked on as a keeper and all the prohibit:
:ions against pasturage applied to his forest. An early
enactment⁽²⁾ states that forfeits are to be paid by 'bonds' by
those whose anⁱmalia are found pasturing in forests and
various statutes have repeated the penalty of escheat.⁽³⁾ It
is interesting to find an exception to the prohibition for it
was confirmed in 1317 that the Burgesses of Stirling had the
right /

(1) Stair's Institutes 2,1,7.

(2) Leg. For. C.19

(3) 1535 Cap. 12; 1592 Cap.35; & in 1594 & 1689.

right of pasture for horses in the King's Forests between
(1)
Forth and Carron.

In Scotland this Servitude might be very extensive and it could comprise the stocking of the servient tenement to the full so that the proprietor might be himself unable to pasture his cattle. Of course, the proprietor still had the right of tillage, working for coal and other minerals and all the other pertinents unless restricted by consent or custom (2) as it is the grass only which is the subject of the servitude. The right, however, could not be extended to exclude the owner of the servient tenement if there was grass enough for both, not did infestment in a muir cum communi pastura give an interest to ⁱhinder the heritor or superior from "riving out" some parts of it and turning it to corn, but only gave a (3) claim of damages against him. The owner of the dominant tenement cannot if he has more than one farm send stock from a farm which is not the dominant tenement to pasture on the servient tenement nor can he make hay or kill game in virtue of /

(1) A.P.S. 1317. 1. 477b.

(2) Stair, 2, 7, 14.

(3) Littlejohn v Weir 10 Jan. 1693

(1)
of his right of pasturage.

The servitude of Pasturage may be constituted by prescription which may proceed on a general grant as "cum 'communi pastura'" or on 'part and pertinent'; It may even proceed on a bare conveyance of land as was decided in the leading case of Beaumont v Lord Glenlyon (2) and thus while a bounding title without a clause of part and pertinent precludes a party from acquiring property beyond by prescription it is a sufficient title for the acquisition of a servitude. The servitude of Pasturage may also be constituted by grant. A personal obligation granted by the owner of the servient tenement followed by possession is effectual, but to render the servitude created by grant effectual against singular successors it must of course either be followed by possession or be feudalised by registration.

Rankine points out that while a Burgh of Barony cannot be the dominant tenement for a servitude of pasturage claimed for /

(1) Forbes 1 Feb. 1809 F.C. Cunningham 15 Shaw 295
Dig. VIII.111.16.

(2) 1843, 5 D.1337.

(3) Garden 27 Nov.1734 M.14517 & Pennymuir 7 Dec.1632 M.14502 Duff states that though no technical words are essential to be employed the following are proper and customary "An heritable and irredeemable right servitude & attolerance of pasturing horses cattle & bestial on (or digging,winning & driving fuel feal & divot from) the Moor of lying in the parish of and shire of with sufficient roads and passages to and from the same.

for all the inhabitants over lands extra fines burgi it has been stated to be neither anomalous nor unusual for the Magistrates of a Burgh (meaning a Royal Burgh) to be the dominant heritors of a Rural Servitude for the use of the inhabitants of the community. This has already been mentioned under servitudes of golfing, but the most frequent case of Royal Burghs as dominant proprietors would undoubtedly be where servitudes of pasturage were concerned. We must remember that not so very long ago most burghers grazed a cow or a few sheep on land near the town and indeed this practice is still quite common in some parts of the country.

The right of common pasturage (i.e. common either to the proprietor of the dominant and servient tenements or to several having the servitude over a subject at one and the same time) was most frequently constituted by a clause of common pasturage contained in the Charter of the Dominant Tenement, as 'cum communi pastura' or 'cum pastura' and was often indefinite, mentioning no servient tenement to be burdened /

burdened with the pasturage. In such cases all pasturage appropriated to the lands disposed before the date of the charter were intended to be conveyed ⁽¹⁾. Indeed, prescriptive use gave the right of pasturage upon any ground belonging to the Superior, and even upon land not belonging to him. ⁽²⁾

The usual case of Servitude of Pasturage in Scotland is found where there are several proprietors of lands adjoining some common or muir who all claim a right of pasturage against the proprietor of the common. This right is often very difficult to distinguish from a right of Common ⁽³⁾ for in most cases the possession may be identical, and the distinction can with difficulty be determined by the words of the grant. It has been held, however, that a conveyance "cum communio", "cum communiis" or "with common" constitutes a right of common and even a simple grant of land may by prescriptive possession carry as accessory a right of common though there be no clause of parts and pertinents. On the other hand the words "cum pascuis et pasturis" "with the liberty /

(1) Erskine 2,9,14.

(2) Stair, Institutes 2,7,14.

(3) Duff goes the length of saying (Feudal Conveyancing 89) that the right of Common is usually classed among servitudes though truly one of property.

liberty and privilege of the "Commonty of B" or "with
"pasturage of cattle and privilege of Commonty" infer a right
of pasturage only. In cases where the question is in doubt
and there are many, the prescriptive use of the subjects will
probably determine the right and where the use made of the
property is clearly incompatable with the servitude of
pasturage, common property would be inferred.⁽¹⁾

In cases of common pasturage as might be expected the
problem often arose of how to keep the pasture from being
over-run and so destroyed. Quarrels appeared constantly to
take place regarding the number of cattle kept by each, and
to regulate and proportion the pasturage among the dominant
tenements an Action of Souming and Rouming could be raised;
or else the baron-bailie could refer the matter to the
adjudication of the birleymen of the district who fixed the
number of cattle and sheep according to the soums. A soum of
land is as much as will graze one cow or ten sheep and so
souming the common consisted in determining its grazing
capacity /

(1) Rankine Land Ownership p. 601

capacity, while rousing consisted in portioning it out amongst the dominant proprietors. The action was however confined to determining the number each might pasture and the criterion was the number of cattle which each of the dominant proprietors (~~The action was however confined to determining the number each might pasture and the criterion was the number of cattle which each of the dominant proprietors~~) was able to fodder ⁽¹⁾ during winter. The Action was based on expediency and in view of the ease in which servitudes of pasturage could be acquired in Scotland without such a remedy many servient tenements would have been rendered utterly useless.

The servitude of pasturage gave rise to a number of other rights which were considered necessary for its full use and enjoyment. Thus servitudes of way or access were usually implied in the grant, and the right of erecting a shelter on the pasture lands has already been mentioned. Closely allied to pasturage are the servitudes of fuel, feal and divot. Stair goes the length of saying that fueling "is presumed to be comprehended /

(1) Innes' Legal Antiquities

"comprehended under pasturage though not expressed as the
"minor servitudes are involved in the major, yet this
"presumption is taken off by contrary custom or express
"paction".⁽¹⁾ Some remarks on these rights thus follow naturally
on pasturage.

Fuel, Feal and Divot

The servitudes of fuel, feal and divot consisted in the
right to dig and cast peat for fuel, and turf for fencing and
roofing,⁽²⁾ and it was the nature of our Scottish muirs and
commons that made such servitudes a natural adjunct of the
right of pasturage. The servitudes were however distinct and
not inevitably conjoined, though from the remarks of the
institutional writers it would appear to be rare for the
greater servitude of pasturage not to include these smaller
ones.

The servitude of feal and divot was unknown to the
Romans but unlike thirlage which had likewise no Roman
parallel, it conformed to the principles of servitudes of
Civil /

(1) Stair's Institutes 2,17,13.

(2) In English law there is the profit a prendre of
Turbary - a right in common of cutting turf -
Stephen's Commentaries. Vol.1. 621. There is no
similar servitude in law of France.

Civil law, and had the agricultural and climatic conditions of Italy been analagous to those of our own Country, the servitudes harenae fodiendae and cretae eximendae warrant the assumption that the counterpart of feal and divot would certainly have ranked among the servitutes praediorum rusticorum.

The servitudes now under discussion were for the ordinary uses of the dominant tenement and would not generally be extended further, asto supply the needs of a heritor who required fuel for carrying on some trade ⁽¹⁾ nor could they be extended to the use of the other lands also owned by the dominant proprietor. But here again custom transcending rules might operate to extend the right.

Fuel, feal and divot carried with them the right to the use of ground on the servient tenement on which to dry the peat or turf and a way for carting them, or as is still customary in some parts of Scotland for drawing them on a sled /

(1) Leslie 27 Nov. 1793 M.14542. We may compare with this the Roman servitude of taking clay from the servient tenement for making vessels for the use of the dominant tenement. If these were made for sale then there could be no servitude, and a right, if it existed for that purpose would be one of usufruct. Dig. VIII.III.6

sled to the dominant lands.

Like some other rural servitudes which in the past were of importance in Scotland, changed and improved conditions have now made the servitudes of fuel, feal and divot of little consequence. But such rights still exist. The last case where the servitude of fuel came under judicial cognisance (mentioned by Rankine in his 4th edition of Land Ownership) was in 1882 and related to a parish in Shetland where from time immemorial the schoolmaster had been in the habit of taking peat from a commonty.

SERVITUDES of ROAD or WAY

Though two hundred and fifty years ago the chief and most frequent rural servitude in Scotland was that of thirlage (with pasturage as a close second) at the present day the servitude of road or way, in Scotland as in England, is more familiar than any other.

In Roman Law this servitude was recognised as one (1) of the oldest and most important of the rural servitudes, and though the distinctions of the Civil Law have not been accepted entirely in Scotland, a survey of the principles of iter, actus and via is indispensable to the study of the subject.

Servitudes of way in Roman Law were of three kinds, each inferring a different degree of use. Iter was the right of passing across land on foot or on horseback - iter est qua quis pedes vel eques commeare potest - or in a litter. Actus was the right of driving animals or vehicles across land - qui actum habet et plastrum ducere et jumenta agere potest - and included the lesser right of iter. The most complete right of passage /

(1) The antiquity of via, actus and iter is proved by the fact that they were regarded as res mancipi, as was also aqueductus.

passage was via, comprehending not only the two first, but also the right of using the road for all sorts of carriages and for dragging stones, wood and building materials - via est jus eundi et agendi et ambulandi: nam et iter et actum in se via continet. The via in the absence of special agreement was of the width provided by the XII Tables, namely eight feet where the road is straight, but in an "anfractus" that is where it winds, sixteen feet.⁽¹⁾ In the case of an iter or actus where no width was specified, there was no statutory provision, but an arbiter was appointed who settled the matter.⁽²⁾ If a via was granted but the space pointed out was too narrow to allow a carriage or a horse to pass, then it was held that an iter was acquired and not a via or actus, and if there was room for a horse but not a vehicle, it was inferred that the grant was one of actus.⁽³⁾

A via in the usual case reached as far as some town, or up to a high road, or to a river crossed by a ferry, or to some other land under the same ownership as the dominant estate, and /

(1) Viae latitudo ex lege Duodecim Tabularum in porrectum octo pedes habet; in anfractum id est, ubi flexum est, sedecim. Dig. VIII, 3, 8.

(2) Dig. VIII, 3, 13.

(3) Dig. VIII, 1, 13.

and a via was not barred even by a public river flowing between
(1)
two estates belonging to the same person.

The Via appeared to give to the dominant proprietor all the rights he would have on the imperial or pretorian way. It was the only one of the three on which he could carry his
(2)
spear in an upright position - a matter which appears to have been the subject of much enquiry among the Roman jurists. Of course a person having a right of this nature would be, as a rule, a landowner of some importance who would often have occasion to march his spearsmen along the via. It is obvious also that if the rights of iter and actus had included the right of carrying a spear erect, the burden on the servient owner would have been much more onerous, as he would have required to leave a higher space than otherwise would have been necessary, and he could not with the same freedom have planted trees /

(1) quia via consummari solet vel civitate tenus, vel usque ad viam publicam, vel usque ad flumen, in quo pontonibus trajiciatur, vel usque ad proprium aliud ejusdem domini praedium. Quod si est, non videtur interrumpi servitus, quamvis inter ejusdem domini praedia flumen publicum intercedat. Dig Vlll, 3, 38.

(2) Dig Vlll, 3, 7.

trees or erected buildings near the passage way.

The three kinds of way could not necessarily be used to the full, for they might be made subject to many limitations. The passage might only be for use in the daytime,⁽¹⁾ or every other day, or between certain hours. Likewise there were often qualifications such as that the way should only be used with a horse, or for driving over it some flock, or that a fixed weight or a particular commodity only should be conveyed.⁽²⁾

The right of way might be given without restriction as to its direction, and in such a case the person having it was at liberty to form the route over any part of the servient tenement. But it was pointed out that such grants are always subject to a tacit reservation, and the party could not be allowed to walk or drive through the house itself, or straight across /

- (1) Usus servitutum temporibus secerni potest: forte, ut quis post horum tertiam usque in horam decimam eo jure utatur, vel ut alternis diebus utatur. Dig. Vlll, 1, 5.
- (2) Modum adjici servitutibus posse constat; veluti quo genere vehiculi agatur, vel non agatur, vel ut equo duntaxat, vel ut certum pondus vehatur, vel ut grex ille traducatur, aut carbo portetur. Dig. Vlll, 1. 4.

across the vineyards when he might have gone some other way
(1)
with equal ease. Once the course was taken then the dominant
owner was bound by it, and could not afterwards change the
direction. This matter was usually settled by an arbiter being
appointed whose duty it was to deal with such cases and fix the
(2)(2a)
course of the way.

If however, the servitude was imposed by will and not
by some inter vivos deed, a peculiar distinction appears to have
been recognised by the Civil law. In such a case the right of
allotting the position and direction of the servitude lay with
the heir, provided he did nothing to injure the rights of the
party to whom the servitude was devised.
(3)

Despite the apparently rigid division of servitudes
of /

(1) Si cui simpliciter via per fundum cujuspiam cedatur,
vel relinquatur, in infinito (videlicet per quamlibet
ejus partem) ire agere licebit; civiliter modo. Nam
quaedam in sermone tacite excipiuntur; non enim per
villam ipsam, nec per medias vineas ire agere sinendus
est: cum id aequae commodae per alteram partem facere
possit, minore servientis fundi detrimento. Dig. Vlll,
1, 9.

(2) Dig. Vlll, 3, 13.

(2a) It is interesting to find the Roman solution of
appealing to Arbiters adopted in France, for there,
where any ambiguity exists, recourse is had to the
ministère des experts. See Louis Astruc Traité des
Servitudes 41-42.

(3) Si via, iter, actus, aquaeductus legatur simpliciter
per fundum, facultas est haeredi, per quam partem
fundi velit constituere servitutem; si modo nulla
capitio legatario in servitute fit. Dig. Vlll, 3, 26.

of way into the three classes above distinguished, unless the terms iter actus and via with their special significance were adopted, it would appear that a rigorous classification of rights of way did not apply, and a state akin to the position in Scotland was possibly more frequent in Roman Law than the above distinctions would lead one to imagine.

In Scotland there has, however, never been a division of servitudes of way into such distinct classes. Several writers in their anxiety to find a parallel in the law of Scotland have distinguished between a foot road, horse road, coach road, and loanings by which cattle may be driven. But in Scotland there is no rule that a foot road should include a horse road. Yet Scots Law does approach much nearer to the Roman idea than does English law. In England the distinctions of Civil law are
(1)
entirely rejected, and there is for example, (and as opposed to the Scottish practice) no rule that the more burdensome right includes /

- (1) Gale on Easements 10th Ed. Ch 5. Coke, however, did make use of the same terms as the Civil law in distinguishing the several kinds of way, but he does not appear to have attached the same meaning to them. He says:—"There are three kinds of way: first a foot way which is called iter, quod est jus eundi vel ambulandi homini; and this was the first way. The second is a foot-way and a horse-way, which is called actus, ab agendo; and this vulgarly is called pack and prime way, because it is both a foot-way, which was the first or prime way, and a pack or drift way also. The third is via or aditus, which contains the other two, and also a cart-way &c. for this is jus eundi, vehendi et vehiculum et jumentum ducendi".

includes the less. In Scotland the principle of tantum praescriptum quantum possessum has not been so rigorously applied, and if a dominant proprietor had been accustomed to drive carts over a road, he could not be hindered if he subsequently used it for Carriages too.⁽¹⁾

In France the classification of Roman law has not been adopted as is clear from Lalaure's statement on this point:⁽²⁾ "Si en droit romain on distingue trois sortes de servitudes de passage; iter, actus, et via, en France on ne distingue point les chemins sous ces termes: on n'en connaît que trois sortes, savoir: Les sentiers - pour les gens de pieds; les chemins privés - pour les charrettes et voitures; et le chemin public ou royal, qui sert indistinctement aux gens de pieds, aux chevaux de traits, et aux voitures soit publiques ou particulières."⁽³⁾

Stair takes up a different position in this matter. After remarking that by the Civil law the greater right of way comprehends the lesser, he says "Our custom sticketh not to this distinction, but measureth the way according to the end for which /

(1) Malcolm v. Lloyd 1886, 13R. 512.

(2) Lalaure, Traité des Servitudes Réelles, 1761.

(3) Lalaure's statement is confusing. The third category of "chemin public ou royal" can in no sense be a servitude.

The law of 8th April 1898 introduced a "Servitude légale" (see page 101) whereby a right of passage to small streams for the purpose of cleaning was created. Thus when there is a reason to enlarge the bed of a river or to establish a new one the neighbouring lands can be occupied by right of a so called servitude of passage. (Planiol and Ripert, Traité Élémentaire de Droit Civil Vol 1. Sec. 2907)

which it was constituted, and by the use for which it was introduced, as having only a foot-road; or a road for a horse to be led or ridden upon, or only a way for leading of loads upon horseback, or a way for leading of carts, or a way for driving of cattle, and is observed accordingly".⁽¹⁾

But Stair's criterion of "the end for which it was constituted and the use for which it was introduced" is not of general application to the servitude of way and can only apply where there is some specialty arising out of the purpose for which the road was granted. Thus it is perfectly correct to say that a servitude of a kirk road may be acquired for the purpose of going to service on Sundays, which could not be used for other purposes.⁽²⁾ And likewise one who has acquired a servitude of way to a moss for casting turf cannot use the way for other purposes.⁽³⁾ An extreme example of the limitation of the servitude by reason of the purpose for which it was acquired is found in the case of *Porteous v. Allan*⁽⁴⁾ where it was held that a right of a drove road for the passage of sheep to and from an annual fair might be obtained. But in these cases the restricted character of the destination puts them in /

(1) Insts. Book 11.Tit7, Sec 10.

(2) *Bruce v. Wardlaw*, 1748, M. 14525

(3) *Ross v. Ross*, 1751, M. 14531

(4) 1773, M. 14512

in a class by themselves. When we consider the ordinary case of the servitude of access between a dominant tenement and the highway, or between two parts of the dominant tenement, Stair's statement of the law is not applicable. Lord President Clyde in a recent case ⁽¹⁾ says "I know of no Scottish case in which - apart from some specialty arising out of the peculiar character of the terminus ad quem - a prescriptive servitude of way has ever been held to be established subject to limitations with reference to the purposes of the traffic which might be carried by it.....I have always understood that the access if constituted at all was constituted as a general one to and from the ground of the dominant tenement, and that therefore the traffic entitled to use it was unlimited as regards the purposes it served so long as these purposes were connected with the enjoyment of the dominant tenement". On the other hand if prescriptive use had determined the right the result would have been a multiplicity of servitudes of way, which in fact does not exist.

Another point of interest in comparing the Roman system with our own is found in the question of whether or not a servitude of way can be altered and another substituted. In the Civil law once the course of the way was determined by an /

(1) Carstairs v. Spence 1924 S.C. at page 386.

an arbiter or by the heir, so it remained fixed. But in Scots law in the case of certain rural servitudes the servient tenement has received more consideration and circumstances might lead to a new route being substituted. The reason for this departure may be found in the development of cultivation in Scotland which would have been much handicapped had old servitudes of way been upheld and maintained against all changes. So there are cases such as *Bruce v. Wardlaw*,⁽¹⁾ where despite the fact that there was a decret as old as 1650 constituting a servitude of a kirk road, supported by possession, nevertheless the Court was of opinion that the servient proprietor might alter the road for his convenience and furnish another although it was somewhat longer. The object of a servitude of way to a kirk or a mill or a pasture was to give access and the precise route in such cases was probably of secondary importance, provided it was reasonably convenient; and if it was insisted that the way once established must ever remain unaltered the result would be somewhat absurd. But an entirely different state of affairs exists in relation to rights of access in connection with urban property, and in such cases even if the servient proprietors come forward and offer an equally convenient passage, no substitution is possible, and the route having been determined so it must remain.⁽²⁾

(1) 25th June 1748 M. 14525. See also *Ross v. Ross*, 19th February 1751, M. 14531.

(2) *Hill v. Maclaren*, 1879, 6R. 1363; *Moyes v McDiarmid*, 1900, 2 F. 918.

Servitudes relating to Water

Scotland is not a country in which these servitudes which relate to water take a relatively prominent place. An overabundance of water is the usual feature, and the need for irrigation is unknown; and whereas in Roman law the right of taking water across another's land was a regular and valuable adjunct of the dominant tenement, in Scotland the servitude imposed by nature of accepting the overflow from the higher ground is the more usual position. So while aquaeductus was one of the oldest and most important of the rural servitudes of the Romans, in Scotland drainage is a subject of more frequent concern. The Roman servitudes of aquaeductus and aquaehautus have however their counterparts in the law of Scotland.

While rivers and streams flow without interference in their natural channels no question of servitude arises. In the words of an English writer, "The right to receive a flow of water in a natural stream, and transmit it in its accustomed course in an ordinary right of property - a natural right: the right to interfere with the accustomed course either by penning it back upon the lands above, or transmitting it altered in quality or quantity to an extent not justified by actual right in an easement. The right to have a natural stream run in its accustomed course does not /

"not arise by prescription but jure naturale and of common right as an ordinary incident of property; the right to interfere with this natural course by altering the quality or quantity of the water is an easement and is claimable by (1)
"prescription."

But interference with the natural course and condition of water is very frequent and has given rise in Scotland to the two servitudes of watering and water-gang.

The difference between these two servitudes amounts to this that watering is a right of taking water on the ground of another - ^{√ ?} in aliena solo - involving the right of way over the servient land and possibly including the right of driving cattle to the spring or stream: but it does not include, and this is the point of distinction, the right to conduct away the water by an artificial channel or other apparatus to the dominant tenement, and if the water is so led from the servient tenement, the servitude is that of water-gang. It is clear that the two servitudes correspond exactly to aquaehaustus and aquaeductus of civil law.

The grant of a right of watering carries with it, as in the Roman system, the right of access; but if the water in /

(1) Gale on Easements Part 111. (1)

in question is a public river or a public loch, the proper grant would appear to be a servitude of way to that river or loch, and not a bare right of watering there. By Roman law if a right of drawing water at a public river was conveyed without a right of iter to it, the servitude was inoperative. This is probably the position in Scotland, though the question does not appear to have been raised.

From natural causes the spring or river may dry up, and if so the servitude of watering ends, but if the water returns then following the rule of the Civil law the servitude is held to have been suspended and revives again. A different position would arise if the supply was curtailed or ended through the operations of the servient proprietor, for in such circumstances the dominant owner could demand an equally convenient supply, or, failing which the restoration of the status quo. But as long as the operations of the servient owner do not interfere with the due exercise of the servitude no objection can be taken /

(1) See Stair Book 11 Title VII, XI.

(2) "Ad flumen autem publicum, idem Neratius eodem libro scribit iter debere cedi, haustum non oportere, et si quis tantum haustum cesserit, nihil eum agere". Dig. VIII. 3.3.

(3) Dig. VIII. 3. 35. We find the same rule repeated in the Calabrian Procheiron. "If a spring from which a person draws water runs dry for some time and then flows again in its own channels, the servitude is renewed and restored as before". Freshfields 'Provincial Manual of Later Roman Law' 1931.p.66.

taken and it has been held that the proprietors of a stream of water liable to a servitude of watering cattle may cover over the rest of the stream so as to exclude cattle provided they leave open a part of it sufficiently extensive to admit the (1) reasonable exercise of the servitude.

As far as the dominant owner is concerned, he may, following the rule of Civil law, make any alteration in the mode of exercising a servitude so long as he imposes no extra burden on the servient tenement. He can make the position of his servient neighbour better but not worse. Gale however points out that this rule of Roman law must be taken with some qualification when applied to natural rights. The owner of land in which a spring rose or upon which rain water gathered was allowed for the necessary purposes of cultivation to impose within reason a greater burden on his neighbour by changing the course of the water running on to the servient land. This matter is however outside the subject of study and pertains to these servitudes which the law of nature imposes. An inferior heritage has no option and must accept the water which flows from higher land even though it should cause damage to the lower subjects. Quod si natura aqua noceret ea actione non continentur

When /

(1) Beveridge v. Marshall 18 Nov. 1808. F.C.

When instead of going to the water on the servient land a supply is conveyed by some artificial means from the servient to the dominant tenement the servitude is that of water-gang. Such servitudes have of recent years become much less frequent than formerly. They were usually constituted to turn the miller's wheel or some other form of water engine for which modern engineering has little use. Closely allied to water-gang is the servitude of dam or dam-head or the right of placing a dam on a neighbour's lands to collect the water.

There are a number of old cases dealing with these rights which give an idea of the difficulties they raised. In ⁽¹⁾ Bruce v. Dalrymple a servitude of a dam was obtained by prescription for draining coal, and in course of time more and more water was collected in the dam and the dike heightened. The result was that the ground of the servient tenement was being covered to an increasingly greater extent, and an action was brought to have the dike reduced to the height at which it had stood forty years previously. It was held, however, that the dominant tenement was entitled to a dam sufficient for draining the coal and was not bound to restore the dike to its old height. The principle of regulating the right by the need for water is ⁽²⁾ also illustrated in Kincaid v. Stirling where an upper proprietor diverted /

(1) 4th Nov. and 11th Dec. 1741 Elch.h.t. 2 Sup.v220

(2) 12th Jan. 1750 Morrison's Dic. 12796 and 8403.

diverted the course of a stream so that it ceased to enter the river above Kincaid's dam. Here the Court held that if the stream was necessary for Kincaid's Mill it could not be diverted, but if it was not necessary, then as a servitude could not be emulously extended beyond the necessary use of the mill, the course could be so diverted. In this case the court was probably influenced by the fact that no injury was done by diverting the stream. A servitude must be exercised civiliter but except in so far as justified by that rule the decision in Kincaid v. Stirling has not been followed.

In both water-gang and damhead the burden of maintaining and repairing the channels and works lies with the dominant owner, but the servient owner cannot compel him to do repairs against his will, and may himself perform such operations as are necessary to protect the servient land, provided they do not prejudice the dominant owner. In the case of Carlile of Limekilns v. Douglas of Kelhead ⁽¹⁾ damage was done to neighbouring lands from re-stagnation of water, not due to the insufficiency of the dikes but to mud and gravel which was carried down by floods. As the re-stagnation was not due to any opus manufactum of the owner of the mill which was the dominant tenement, the owner /

(1) Nov. 1731 Morrison's Dic. 14524.

owner was not found obliged to clean the dam though the servient proprietor could clean it if he pleased. In view of this duty on the dominant owner to repair the water-gang and dam-head, a right of access at reasonable times is required, and should an obstruction have been erected which prevented the inspection of the works, such as a building on the top of a conduit, the erection could be interdicted, though naturally the matter would turn on the individual circumstances of each case.

Quite different from water-gang is the right known as sinks - that is the right of discharging polluted water and filthy matter over a neighbour's tenement or into a neighbour's stream. This right is a recognised servitude.

Every riparian owner has a natural right to the water of the stream unpolluted beyond its normal state, and is accordingly entitled to demand that the water shall not be contaminated by the refuse of a factory or the sewage of a town. Numerous enactments have been passed in recent years prohibiting the pollution of water and the subject is now largely regulated by Statute law. ⁽¹⁾ It is quite clear however that /

(1) As early as 1606 an Act of the Scots Parliament prohibited the laying of green lint in lochs and burns on the ground that it was 'hurtful to fish and bestial, unprofitable for the use of man, and very noisome to all people dwelling thereabout.'

that a right may be obtained to pollute a stream, but such a right can only be acquired by the continuance of a perceptible injury for the prescriptive period, and there can be no prescriptive right to justify a public nuisance, nor would a plea of use be of any avail against the Rivers Pollution Act.

OTHER RURAL SERVITUDES

The rural servitudes already discussed are those which have proved of importance in the law of Scotland, but there are, besides, many others. Servitudes do not form a defined and limited class. "There may be as many as there are ways whereby the liberty of a house or tenement may be restrained in favour of another tenement"⁽¹⁾. "Nullum est dubium quia plures esse possint hujus generis servitutes, pro diversa ratione aedificandi et habitantium necessitate"⁽²⁾; (and to take a passage from a French authority) "Les servitudes forment une famille nombreuse: leur nombre n'est même pas limité par la loi; les particuliers peuvent en créer de nouvelles à leur convenance, quand ils en trouvent l'occasion"⁽³⁾. Circumstances and the needs of mankind have added and continue to add to the number. So in Roman Law agricultural conditions and customs imposed such rights as those of taking from the servient property stones, lime, sand, chalk, props for vines and the like, as well as the main rural servitudes of iter, actus, via, aquaeductus, aquaehustus and jus pascendi pecoris. In England likewise /

(1) Stair, Insts. 2, 7, 5. *The fact that a servitude is well*

(2) Heineccius El. J.C. Lib. 8 S. 143.

(3) Traité élémentaire de droit civil. Planiol and Ripert, Vol 1. Sec 2880.

known to the law is however important for the proof of a servitude which does not rest on a properly feudalised title. 25 R.(H.L.) 47 at 52 and 53.

likewise the law has accepted such easements as the rights
to tunnel under another's land; ⁽¹⁾ to mix muck on a neighbour's
land; ⁽²⁾ to deposit trade goods on a neighbour's land; ⁽³⁾ to bury
in a particular vault; ⁽⁴⁾ right of landing nets on another's
land; ⁽⁵⁾ and many others.

Similarly in Scotland several rural servitudes have been recognised which, although not so well known as those dealt with in the preceding pages are nevertheless worthy of mention. Thus there has been accepted the servitude of bleaching. The inhabitants of Kelso had long been accustomed to bleach and dry their linen on the island of Ana, which was held to be a right of servitude. But on appeal this decision was reversed on the ground that no such servitude was acknowledged by the law of Scotland. ⁽⁶⁾ Twenty four years later, however, the servitude of bleaching was recognised, and affirmed on appeal. ⁽⁷⁾ The right to take sea ware and drift wreck was upheld as a servitude, while the right of cutting kelp /

(1) S.E. Rly v. Assoc Portland l. Ch. 24.

(2) Pye v. Mumford 1848, 11 Q.B. 666.

(3) Foster v. Richmond 1910, 9 L.G.R. 65.

(4) Bryan v. Whistler 1828, 8 B&C. 238

(5) Gray v. Bond 1821 2 Brod. & Bing. 667

(6) Jaffray v. Duke of Roxburgh 1755 M. 2340

(7) Sinclair v. Town of Dysart 1779 M. 14517-19

kelp for manufacture has not been regarded with the same
(1)
favour. Quarrying for stone and slate have been acknowledged
as servitudes provided these products were not used for sale,
(2)
but only for the benefit of the dominant tenement. Similarly
there may exist a servitude of taking sand or gravel. The
right to cut timber, it has been thought, could not be elevated
into a servitude, on the ground that it involved a duty on the
servient tenement to keep the right permanent, but in the
case of *Garden of Bellamore v. Earl of Aboyne* (3) where the
privilege of cutting timber was constituted by writing in
favour of a neighbouring heritor, for the use of his lands
and tenancy, the Court found this a real servitude, good with
possession against singular successors.

This is not a complete list of the lesser rural
servitudes. These may be as manifold as the ways in which one
tenement can be restrained in favour of another. But those
mentioned show how servitudes have been created to meet the
needs of the time. Changed circumstances will bring into
existence /

(1) *Earl of Morton v. Covingtree* 1760, M 13528.

(2) *Murray v. Mags. of Peebles* 1808 F.C.

(3) 27 Nov. 1734 M. 14517.

e/ existence new rights to take the place of those which have dropped out of use and while pasturage, and feal and divot may cease to occupy the attention of the lawyer, the need for landing places for aeroplanes, car parks and the like indicate possible sources of rural servitudes in the future.

(4)

URBAN SERVITUDES

While we may question the extent to which Roman jurisprudence is responsible for our rural servitudes and point to feal and divot, thirlage and other rights unknown to the Civil code, the urban servitudes are in an entirely different position and have been taken practically in toto from the Roman system. Montesquieu's well known theory that laws must vary with the nature of the soil and climatic conditions does not apply in the same way to the rules which relate to buildings. Cities and towns differ little no matter where they are situated and rights to light and support which were operative in Rome and Constantinople apply with equal effect to buildings in Scotland.

The most obvious explanation of this wholesale adoption of servitudes praediorum urbanorum is that the development of our larger towns in the fifteenth and sixteenth centuries coincided with the growing interest in and application of Roman Law in Scotland. Before such servitudes as altius non tollendi, tigni immittendi, oneris ferendi, and those relating to light and prospect are of much importance, private houses must have attained a considerable measure of durability, size and site value. The houses even in large cities like London were /

were built mainly of wood in some cases down to the seventeenth century. In Scotland in the country clay biggins having roofs thatched with straw were probably the most frequent, or as was common in England, houses might be constructed with the trunks of trees in pairs, one end of the trunk being sunk in the ground and the other being bent over and secured with a ridge piece, thus forming a pointed arch. In nearly all the early accounts of Scotland the houses, especially in the country districts are described as poor and small. John Major⁽¹⁾ in his History of Greater Britain explains that this is so because the people had no permanent holdings, but leases for four or five years at the pleasure of the lord of the soil, and "therefore do they not dare to build good houses though "stone abound". Richard Franck (1656) remarks that "these "inhabitants dwell in such ugly houses as in my opinion are "but little better than huts and generally of a size, all "built so low that their eaves hang dangling to touch the⁽²⁾ "earth". Even the upper classes did not necessarily have much better houses. Dr Johnston when journeying in Scotland called for Sir Allan Maclean at Inch Kenneth and describes the /

(1) Hume Brown "Scotland before 1700"

(2) Do. "Early Travellers in Scotland"

the mansion house as consisting of a number of cottages, only one storey high, one being for Sir Allan and two more for the servants and offices.

We may be sure that such erections as these were incapable of bearing the burden of rights of support, or were of too poor or flimsy a nature to render important anything corresponding to the urban servitudes. It is certainly the fact that the Leges Quattuor Burgorum, in which we possibly might have expected to find some reference to such rights, are silent on the subject, and the earliest mention of Urban Servitudes in the Acts of the Scottish Parliament is not until 1592. When private buildings in Scotland had reached the stage when the need for such servitudes began to be felt there ^{were} ~~was~~ well known to lawyers the excellent rules of the Civil law ready to meet that need.

The Digest contains the following concise statement
taken from Gaius's Provincial Edict ⁽¹⁾ "Urbanorum praediorum
"iura talia sunt: altius tollendi et officiendi luminibus
"vicini, aut non extollendi; item stillicidium avertendi in
"tectum vel aream vicini, aut non avertendi; item immittendi
"tigna in parietem vicini; et denique proiciendi, protegendi,
"caeteraque /

(1) Dig. Vlll. 2. 2.

"caeteraque istis similia". and the following paragraph adds:-

"Est et haec servitus eorum, ne prospectui officiatur".

Before dealing with these servitudes in detail the way in which they are described in the text attracts attention. The right appeared to be either that of doing some positive act or of hindering the same act from being done - of raising a building higher, or of preventing such raising. Now servitudes are limitations on the rights of ownership. But an owner requires no servitude to enable him to exercise his natural rights. The fullest right of ownership of a thing is a right to use the thing in all available ways, to part with it, and to destroy it; That is what is meant by "dominium". In consequence the owner needed no servitude to enable him to build as high as he liked (though the power of hindering his neighbour from doing so was a different matter). Then why does the text specially mention such a right as if a privilege were being conferred?

Several explanations may be suggested. It may be that the house had once been subject to a servitude of altius non tollendi or of stillicide and so the imposition of the contrary right was the means of freeing it. In the case of Stillicide this is a probable explanation.. Or it may be that rules /

rules of local government, analagous to municipal prohibitions now enforced by a Dean of Guild Court, hindered a house from being raised above a certain height ⁽¹⁾ or forced an owner to accept his neighbour's eavesdrip, and such prohibitions could be evaded by the adjoining proprietor granting a relief as by saying "you may build higher" or "you may not be liable to accept my eavesdrip". Although this view has considerable support it is difficult to imagine that a right of servitude would be recognised contrary to Imperial enactments in the interest of public policy. The most favoured view is that a partial relief was being granted. That is, if a neighbour was subject to a servitude altius non tollendi, the right might be given of building higher but only to a certain limited extent. The whole question is however subject to much doubt, and though the last suggested explanation may be the most probable as far as building higher is concerned none can really be termed conclusive or satisfactory.

Servitudes of light and prospect appear to have been much more favoured in the Civil law than in our system and /

- (1) Regulations were made by Augustus and some succeeding emperors against the excessive height of buildings in Rome, because of the danger that would otherwise ensue in the event of accidental fire.

and judging from the many references in the Roman Texts, such servitudes appear to have been very extensive. That this should be so may be due to climatic conditions as large windows giving broad prospect and abundance of light would certainly have proved a doubtful benefit to the older Scottish houses. The remarks of our institutional writers on the subject bear this out especially when compared with the statements in the Digest and with the extract from the Hexabiblos quoted below. Indeed the whole attitude to light and prospect illustrated in the Roman law cannot but impress an observer as being far more akin to modern ideas than our Scots texts.

Dr Johnston's account of his journey to the Western Islands contains a description which gives some insight into the position in Scotland in the later part of the eighteenth century. His remarks are worth quoting. "The art of joining squares of glass with lead is little used in Scotland, and in some places is totally forgotten. The frames of their windows are all of wood. They are more frugal of their glass than the English, and will often in houses not otherwise mean, compose a square of two pieces, not joining like cracked glass, but with one edge laid perhaps half an inch over the other. Their windows do not move upon hinges, but are pushed up and drawn down in grooves, yet they are seldom accommodated with weights /

"weights and pullies. He that would have his window open must
"hold it with his hand unless what may be sometimes found 20
"among good contrivers, there be a nail which he may stick into
"a hole to keep it from falling. What cannot be done without
"some uncommon trouble or particular expedient will not often
"be done at all. The incommodiousness of the Scotch windows
"keeps them very closely shut. The necessity of ventilating
"human habitations has not yet been found by our Northern
"neighbours; and even in houses well built and elegantly
"furnished a stranger may be sometimes forgiven if he allows
"himself to wish for fresher air". If such was the position
in Scotland as late as the time of Dr Johnston's famous journey
we need hardly be surprised that servitudes of light and
prospect do not take a relatively large place in our law.

According to Stair".....the owner of every
"ground may build thereupon at his pleasure, tho' thereby
"he hinder the view and prospect from his neighbour's tenement,
"or the coming of sun-beams or light thereto, which being but
"in relation to the extrinsick benefit of that, which is not in,
"but without the tenement is not accounted a positive damage
"from which the owners of neighbouring tenements must abstain,
"as in the case of stillicides and sinks: and so much the rather
"that common utility would be highly impaired if the first
"builder /

"builder might hinder his neighbour to build upon his own
"ground upon pretence that thereby his light or prospect were
"hindered; so that it is free for the owner to build what he
"will, tho' thereby he darken his neighbour's tenement. For
"helping the inconveniency that may ensue by this liberty of
"building two servitudes use to be introduced both restraining
"the owner's liberty....." This somewhat reluctant
allowance of servitudes of light and prospect is very different
from the following extracts from the Digest. ⁽¹⁾ ".....quod in
"prospectu plus quis habet, ne quid ei officiatur ad gratiorem
"prospectum et liberum, in luminibus autem, ne lumina cuiusquam
"obscuriora fiant, Quodcunque igitur faciat ad luminis
"impedimentum, prohiberi potest, si servitus debeatur, opusque
"ei novum nuntiari potest, si modo sic faciat ut lumini noceat"
and also "Lumen id est, ut caelum videatur. Et interest inter
"lumen et prospectum; nam prospectus etiam ex inferioribus locis
"est, lumen ex inferiore loco esse non potest." and in the
following section "Si arborem ponat ut lumini officiat aequè
"dicendum erit, contra impositam servitutem eum facere; nam et
"arbor efficit, quo minus caelum videri possit. Si tamen id,
"quod ponitur, lumen quidem nihil impediât, solem autem
"auferat /

(1) Dig. VIII. 11. 15, 16, & 17.

"auferat, siquidem eo loci, quo gratum erat eum non esse,
"potest dici, nihil contra servitutem facere; sin vero
"heliocamino vel solario, dicendum erit, quia umbram facit
"in loco, cui sol fuit necessarius, contra servitutem impositam
"fieri."

The Roman attitude to the servitudes under discussion is possibly expressed in the following extract from a much later manual ⁽¹⁾ of Roman law. "Vision is the keenest of all the senses and exercises its power at the longest distances. For that reason we must not legislate rashly or fortuitously by prescribing definite measurements which may restrict it. It is said that the law thereon falls into three categories: prospect (1) of the sea, (2) of the land (3) of public monuments. Those who try to prescribe the right of view as indefinite cause much inconvenience to persons desiring to build. For example the sea is visible more than 40 miles away; a garden, trees or forests up to 20 miles; public monuments 20 cubits.

"If therefore we prescribed those distances neither houses, villages nor cities could ever be built. The general rule is then laid down that 100 feet must intervene between the/

(1) Freshfield's translation of the Calabrian Procheiron. P. 78.

"the possessor of a direct view of the sea and any building
"which a neighbour proposes to erect.

"A builder shall in no wise deprive his neighbour
"of a view of a harbour, or the shore or of an open roadstead
"in towns or cities which have no constructed port 'for much
"pleasant recreation is derived from such a prospect by the
"spectator'. If however the intervening space was 100 feet
"or more then the builder of the new house was free to build.

"In the case of a garden or plants the minimum
"distance was 50 feet.

"The same distance in regard to statuary as for
"instance of Achilles or Ajax. But in that case the person
"claiming the right to enjoy the prospect of these 'historical'
"persons must be able to appreciate them. If he has no
"knowledge of the object represented or the history of it,
"what pleasure can he derive by preventing the person desiring
"to build from doing so?"

In the law of Scotland there is no regulation which
enforces a space between neighbouring property and a wall
containing /

(1)

containing windows and in this we differ both from the Roman law of Justinian's day and the French code ⁽²⁾ though the servitudes non aedificandi and altius non tollendi are both in use in Scotland to protect light and prospect. But their benefit is much limited for these servitudes can be constituted only by express grant or agreement ".....for the first "builder" as Stair says, "tho' he have light or view for a "hundred years through his neighbours ground doth not thereby "put a servitude upon his neighbour.....and therefore tho' "two purchasers bought houses from the same owners neither of "them was found to be astricted not to build as high as they "pleased, albeit to the prejudice of the light and view of "the /

(1) In 1649 the case of Simpson v. Hill and Puntune decided that where there was no servitude ne luminibus officiatur one might build a house which obscured his neighbour's lights; and indeed in the subsequent case of Ogilvie v. Donaldson (5th Feby. 1678 Morrison's Dic. 14534) it was decided that notwithstanding a servitus luminum the defender might build anything he pleased to what height he pleased at an ell's distance, whereby the light would be free, and that he was not obliged to keep at a greater distance even in the country.

(2) Also in the law of England at a very early period an action lay for obstructing ancient lights (Aldred's case 1611, 9 Rep. 58b)* but nothing in the nature of a servitude of prospect was recognised nor does any action lie for the loss of privacy or amenity by the opening of windows in a neighbouring house.

"the other."

Stair does add that these servitudes can be constituted by prescription by hindering the owner of the servient tenement from attempts at building during the prescriptive period. This has never been accepted. The difficulty would lie in proving that the neighbour had had during the prescriptive period the intention and desire to build and would have built, but for the objection of the dominant owner. But in theory Stair's statement is reasonable and its acceptance would often have proved a benefit.

The strict requirement of express grant or agreement for the constitution of these servitudes has been mitigated by the fact that a servitude altius non tollendi or ne luminibus officiendi may also be inferred within a burgh from a building plan which is held out to all persons purchasing ground for building as the general plan of the town, without any mention either of the servitude or the plan in the titles of the property; and the feuars are not entitled to deviate from the plan in any material respect, even where the right of servitude is not
(1)
injured.

There is another class of servitude of light and prospect /

(1) Young & Co. v. Forrest Dewar 17 Nov. 1814. Later decisions chiefly relating to Edinburgh have qualified considerably the rule of the above case.

prospect of an entirely opposite nature whereby the owner of the servient tenement is restricted from interfering with his neighbours privacy by striking out windows in his own wall. This is really an extension of non officiendi luminibus (1) vel prospectui, (2) and is described by Rankine as a short and easy method of accomplishing what the dominant owner might have accomplished without any servitude at all by erecting a sufficiently lofty wall within his own ground.

Apart from cases where light and prospect are involved a class of servitudes non aedificandi of another kind exists in France. In French law there are "Servitudes legales" (3) which are imposed in the public interest and are entirely different from those rights which exist between neighbouring proprietors. Thus proprietors are hindered from building within a determined zone around forts and other military emplacements, and in time of war the military engineers have the right to demolish any erections in the "zone militaire". A striking example of the exercise of this servitude was seen in 1870 when the German army was nearing Paris, and the defence of the city /

(1) Forbes 1 July 1724 M. 14505.

(2) See Erskine Insts. 11. 10.

(3) Traite Elementaire de Droit Civil, Vol 1.
Planiol and Ripert Sec. 2906 and 2907.

city required open spaces around the protecting forts. The demolition of such buildings as may have been raised in the military zone gives no right to compensation, and what is more drastic the establishment of a new fortified area in any district gives no right of indemnity to the neighbouring proprietors who may have buildings in the vicinity.

Servitudes of this nature are peculiar to a country like France where fortified boundaries and military emplacements abound. But there is another example of a "servitude legale" whereby proprietors are hindered from building depots for inflammable materials within 20 metres of a railway line.

In such cases we must consider the fortified area or the railway line owned by the state as the dominant tenement, but the servitude would not of course pass with the lands to a private individual should the state abandon the property.

There are two servitudes relating to support. The passage quoted on page 91 contains the servitude immittendi tigna in parietem vicini which is the right of placing a beam or joist in a neighbour's wall. There is also the servitude oneris ferendi which is the right of resting the weight of a house or part of a house on the neighbours wall or pillar. These two servitudes of support seem at first sight very similar but there is this important distinction that the servient tenement was bound /

bound in the latter case not only to bear the weight but to maintain the wall in repair and capable of supporting the burden. This unique feature of the servitude oneris ferendi may have been due to the express words by which the right was constituted "Nam quum in lege aedium ita scriptum esse, 'Paries⁽¹⁾ oneri ferundo uti nunc est, ita sit'. Such is Erskine's view and the text of the Digest certainly appears to support him, but the matter has been the subject of much controversy and need not be dealt with here.

Whatever may have been the origin of this obligation the position in Justinian's day is quite clear. The Digest explains that the person who is bound to replace a column which afforded support to an adjacent house in virtue of the servitude is the owner of the servient house and not the party who enjoys the support; and after referring to the above words constituting the right goes on to say that they clearly imply that the wall was required to exist in perpetuity. It is recognised that the same wall cannot be expected to exist for ever, but there must always be a wall of the same kind to support the burden just as where a man has given an undertaking that he will afford anyone support for his building if follows that /

(1) Dig. Vlil. 11. 33.

that if the thing which is the subject matter of the servitude and bears the burden should be destroyed another thing of the same kind would have to be supplied in its place. (1)

22
The law of Scotland does not go so far, for in this country the servitude oneris ferendi does not of itself impose this perpetual obligation. The law as stated by Stair has been accepted by Erskine and Bell and is worth quoting. "The question used to be moved here whether the owner of the servient tenement be obliged to uphold or repair his tenement that it may be sufficient to support the dominant tenement. There are opinions of the learned and probable reasons upon both parts; for the affirmative maketh the common rule, that when anything is granted, all things are understood to be granted therewith that are necessary thereto: so he who constituted upon his tenement a servitude of support, he must make it effectual. And for the negative, servitudes are odious, and not to be extended beyond what is expressly granted or accustomed, to which we incline; and therefore it would be adverted how the servitude is constitute, that if it appear, the constituent had granted this servitude, so as to uphold it; or if by custom, he hath been made to uphold it, not upon the /

(1) The above is a free translation of Section 33 of Title 11. of Book VIII. of the Digest.

"the account of his own tenement, but of the dominant, he
"must so continue; and it is not only a personal obligation,
"but a part of the servitude passing with the servient tenement,
"even to singular successors: but if it appear not so constitute
"it will import no more than a tolerance, to lay on or impute
"the burden of the dominant tenement upon the servient, which
"therefore the owner of the servient neither can hinder nor
"prejudge; but he is not obliged to do any positive deed, by
"reparation of his own tenement to that purpose; but the owner
"of the dominant tenement hath right to repair it for his own
"use, by reason of his servitude, and the owner of the servient
"tenement cannot hinder him." ⁽¹⁾ The case of Murray against
⁽²⁾ Brownhill deals with this question of support and raised
considerable argument on the Roman text. But the decision
does not alter the law as stated by our institutional writers.

The Digest further states that whoever has a building
which is with good right superimposed on another may lawfully
build on the top of his own structure as high as he likes, so
long as this does not impose on the buildings underneath a
more burdensome servitude than they should be forced to bear. ⁽³⁾

The /

(1) Stair VII. VI.

(2) 1715 Morrison's Dic. 14521. See Rankine, Land
Ownership page 658.

(3) Dig, VIII. 11. 24.

The foregoing remarks make it quite clear that the servitude oneris ferendi was in every way a much more substantial right than the servitude tigni immittendi. The latter was merely a right of thrusting a beam across the boundary of the dominant tenement into the servient tenement's wall and no obligation rested on the servient owner to upkeep the wall, and indeed the dominant owner had not necessarily the right to enter the neighbours building to repair it himself. It may in fact be the more correct view that the servitude tigni immittendi was more of the nature of a right of projecting or throwing out a structure over a neighbours tenement than a right of support.

In the Calabrian Procheiron there is a reference to the servitude tigni immittendi which is of sufficient interest to warrant its quotation here. ⁽¹⁾ "If I have a servitude which "entitles me to place my joists, that is my beams and apply "and support them in your wall and insert them in joist holes "made in your wall, then if I remove my joists and for ten years "I do not replace them in the joist holes, leaving the holes "open as they were when I took the joists away, then the "prescription (against me) does not run in your favour. But if "when I removed my joists, you close up the joist holes and "they/

(1) Freshfield's translation page 59.

(1)
"they remain so closed for 10 or 20 years you obtain freedom
"from the servitude due to me. For you have acquired the
"'dominium' by usucaption by keeping the joist holes closed
"for that time. If however you leave them open and do nothing
"but leave them in that condition the servitude to me is
"preserved and I can replace the joists in the joist holes
(2)
made aforetime."

The development of tenement property in the shape of buildings divided into flats each belonging to a different owner, at one time raised questions of servitude on the argument that the upper flat was supported by the lower under a servitude oneris ferendi. This is now definitely recognised as not the case. The property cannot be regarded as completely divided into separate compartments, for each proprietor has an interest in the whole. So the law of tenement property falls not under servitudes, nor yet under the law of common property, but is regulated by common interest in the building. The proprietor of the lower floor is thus bound not only to bear the /

(1) The explanation of 10 or 20 years is that servitudes were lost if not exercised for 10 years when the parties interested were present, or for 20 years if absent.

(2) These rules are of course an enlargement of the statement contained in the Digest Vlll. 11. 6.

the weight of the dwellings above him, but also to repair his own walls, and the other proprietors are entitled to insist that such repairs be executed. This is so not because of any servitude, but merely by the nature of the property.⁽¹⁾

The servitude of eavesdrip now falls to be considered.

No proprietor can build so near his neighbour's property that the rainwater from his roof or eaves falls on his neighbour's ground, for a roof which projects over the ground of another offends the maxim cu jus est solum, ejus est usque ad caelum. The provisions of Roman law already referred to which obliged proprietors to build a certain distance within their own property usually prevented eavesdrip on neighbouring land, but in Scotland no Statute makes any similar provision though custom in certain burghs obliges proprietors to keep their buildings a foot or a foot and a half from the extremity of their boundaries.⁽²⁾ In Civil law there also existed the servitudes stillicide and fluminis by which a proprietor was bound to receive on his property the rain drip or the rhone water from his neighbour's house, and these servitudes have been accepted in the law of Scotland.

The /

(1) Ferguson 12 Nov. 1816 F.C. and Pirnie, 5 June 1819 F. C.

(2) See Gariochs, 7th March 1769 M. 13178.

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The Roman law relating to stillicidium is concise and definite. It is explained that this servitude complied with the requirement of perpetua causa for "although water that falls "from the sky does not keep on without interruption, still it has a natural cause and therefore is regarded as being produced perpetually." (1) If a building from which eavesdrip was discharged was taken down with the intention of replacing it with another of the same form and character the latter was regarded for the purpose of the servitude, as the same building as the original one. (2) If this were not so the right would have been lost by the alteration. In the same passage it is stated that the servient owner might not build on the spot to which the eavesdrip has reached. A man however who had built on vacant ground which was subject to a servitude of eavesdrip was permitted to bring up his building to the place from which the fall came, and if the fall took place on the building itself he was allowed to carry the building higher provided he submitted to the drip. (3)

In the old case of Stirling against Finlayson it was decided that the proprietor of a house within a Burgh having the benefit /

(1) Dig. Vl1l. 11. 28.

(2) Dig. Vl1l 11. 20.

(3) 11th June 1752 M. 14526.

benefit of stillicidium upon the adjoining tenement could not urge it as a servitude to prevent his neighbour from raising his house in height, or altering it, so as to prevent the stillicidium; but it was found that the proprietors must put a spout at their joint expense to receive the drop. We may however take it as the law in Scotland that the servitude entitles the dominant owner to prevent any erections on the servient tenement which may be inconsistent with the right.

The Roman text also deals with the increasing of the burden. Briefly, the dominant owner was entitled to make the discharge more tolerable but not more burdensome. Thus the discharge might always be made from a higher level because it is explained that the water which falls from a height falls with less force (though this explanation seems somewhat at variance with the law of gravity) and sometimes is carried away and does not reach the place to which the servitude attaches. Similarly the eavesdrip could be carried back, for it would then fall nearer the dominant land, but it could not be carried forward.

Stillicide can be constituted as opposed to other urban servitudes, impliedly, and by prescription as well as by express grant; but as the right to discharge eavesdrip creates a presumption of ownership of the ground on which it is /

is discharged, it must always be difficult to distinguish between the possession inferring the servitude and that inferring complete ownership.

Closely allied to eavesdrip and involving by its nature that servitude as well, is the right of projecting a building or balcony over a neighbour's land. There are two servitudes relating to such projections recognised in the Civil law. The jus projiciendi entitled a man to make such an addition to his building, while the jus protegendi entitled him to protect the wall, either by creating a shade, against the heat of the sun, or for keeping off the rain.⁽¹⁾ These rights conform to the general rules contained in the preceding pages and need no further comment.

(1) See Dig. 50. 16. 242. de v.s.